

1065-
No. 2503

United States 1065-
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.

(IN THREE VOLUMES.)

A. B. HAMMOND,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

VOLUME III.

(Pages 569 to 842, Inclusive.)

Upon Writ of Error to the United States District Court
of the Northern District of California,
Second Division.

Filed

NOV 11 1914

F. D. Menckton,
Clerk.

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Second Division.

(Testimony of G. W. Fenwick.)

Thursday, January 30, 1913.

My relations with the Missoula Mercantile Company and my method of doing business with them during the time while I was operating the mill at Bonita were as follows: If I required any goods or mill supplies, I had all the credit that I wished at the office of the Missoula Mercantile Company. I ordered the goods of them, such goods as I required, and when I would pay off my men I gave them orders on the Missoula Mercantile Company, in such case the checks that I received from shipments of lumber, after they were placed to the credit of the proper parties on my books, were turned over to the Missoula Mercantile Company, so that I had a credit there, in addition to their willingness to extend me credit. I at all times had credit at that place. As I paid off my men the checks were honored. I could not handle any money up at the mill. We had no conveniences. After I had been operating the mill at Bonita for a couple of years, from that time forward, I had a credit balance at the Missoula Mercantile Company's store, and on that credit balance I received interest and I received interest even after I had ceased operations at Bonita and so long as I had an account there. I was charged interest upon my debit balances by the Missoula Mercantile Company. In addition to the credit given to me at the Missoula Mercantile Company's store, as I testified the day before yesterday, before I completed the purchase of this property from Fred Hammond, I had arranged a contract with the [518] late Marcus

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Daly to back me to any reasonable amount I required to run my operations there and take the lumber and pay for it; and in the early stage of my operations he advanced me funds. After that occasion on which I obtained funds from Mr. Daly, I made no formal application, but I met Mr. Daly quite frequently over in Missoula and in Anaconda, and he would ask me regarding funds and always expressed a willingness, if I needed funds, to advance them. I never called for any other funds than those which I have testified to. I knew Van Keuren, who was a witness in this case. Regarding Van Keuren testifying something to the effect that a contract had been made for furnishing the Bonita Mill with logs and Mr. Hathaway had something to do with the awarding of that contract, the fact is Mr. Hathaway, or no other person, had anything to do directly with any of my contracts. This was a contract with Van Keuren to get out a few hundred thousand, two or three hundred thousand, feet of logs. I made the contract myself, and I paid him myself, I made all of the arrangements myself. Van Keuren did not furnish any other logs to the mill while I was there, other than those covered by the contract I have just testified to. I think he worked by the month there at the mill for either myself or Fred Hammond. He worked by the month. It was after the time that he worked by the month, that he furnished these logs. There were no other contracts for furnishing logs for my mill made with Van Keuren at any time during my stay there. The only contracts made with Van Keuren or any one else

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for furnishing logs were made by myself. Beaver Tail Hill terminates at what we call the slough or mill-pond near the north line of section 14-11-16. The mouth of Cramer Gulch, [519] with reference to the north line of said section 14, would be right at the north line—the termination of Beaver Tail Hill. With reference to the method of felling and removing timber while I was operating the Bonita Mill, each tree, with reference to each other tree, was felled separately. We did not fell one tree on top of another. They were felled in isolated positions. There were no forest fires through the Bonita Canyon during the time that I operated my mill there—none at all between the beginning and close of my work there. I resided in Montana at the time I began my operations at Bonita. I had no other residence in any other state than in the State of Montana. I continued to be a resident of Montana from 1883 until 1900. I am a citizen of the United States. During all that period of time I have testified to, I was living at Wallace, at Bonita, Missoula and a short time in Helena and at Bonner, and during that period of time I had no other place of residence, either for myself or for my family than the places I have just enumerated. Of the trees that I felled, the whole tree was utilized, that is, all of the tree that would be considered merchantable, until it ran up into the top where the limbs were or brush was. There was no sale at that time for the tops of the trees. I could not have profitably utilized the tops of the trees at the time I was cutting there. I had no use for them, no

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sale for them. A large part of the timber that I cut was utilized in Butte, Montana, and Anaconda, for mining purposes, and the remainder of the timber that I cut was used for mining, agricultural and domestic purposes in Montana.

Q. State whether or not any demand was ever made upon you by any officer of the Federal Government for an inspection [520] of your books or records at any time during the time that you were operating this property?

To which question plaintiff objected on the ground that it was irrelevant, incompetent and immaterial. The Court sustained said objection; to which ruling of the Court defendant duly excepted.

Defendant's Exception No. 15.

(Witness Continuing:) Mr. Marshall, whom I have mentioned, was an attorney practicing law in Missoula for about twenty-five years. He was there when I came there in 1883 until he died. During all the time I was operating the mill at Bonita, he was my attorney. In the matter of the conduct of my business, I acted upon the advice of the late T. C. Marshall. My course of action regarding the observance of the rules of the Secretary of the Interior, was in conformity with his instructions in regard to the law during the operations at Bonita. I went to Bonner in the summer of 1891, June or July. At that time I had closed down my Bonita Mill. I was employed by W. H. Hammond, assisting him in the operation of the mill at Bonner. That was after the

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closing of the mill at Bonita. I looked after the general work in the office, also the manufacturing and shipping and taking care of the orders. The mill at Bonner was then running. W. H. Hammond was running it. At that time he was operating it under a lease. With regard to the time of my going to Bonner, Mr. W. H. Hammond ceased to operate the property on his own account at the end of 1891 or the first of the year 1892. I know a corporation known as the Big Blackfoot Milling Company. Myself and wife had one hundred and fifty shares of second preferred stock and one hundred and fifty shares of common stock in [521] that corporation. I owned that stock until the stock was purchased by Mr. Daly in 1898. Some of the other stockholders were W. H. Hammond, C. H. McLeod, T. C. Marshall, E. L. Bonner, A. B. Hammond and R. A. Eddy. I don't know, except in a general way, the respective stockholdings of those whom I have mentioned as holding stock in the corporation. I think Mr. Marshall's shares amounted to about the same as mine, or perhaps less. He was not one of the largest stockholders. Mr. McLeod owned quite a large bulk of stock. When he sold out he realized about thirty or forty thousand dollars. I realized sixty thousand dollars when the stock was sold to Mr. Daly. Mr. Hathaway was quite a large stockholder, larger than myself. George L. Hammond was another stockholder in that company at one time, so was T. G. Hathaway, Jr.; he was a small stockholder. Mr. J. M. Keith was a stockholder. He drew out of the sale about fifteen thou-

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sand dollars. George L. Hammond was a brother of W. H. and A. B. Hammond. There were four brothers altogether. George L. Hammond, who has been spoken of in this case as the walking boss for W. H. Hammond; Fred Hammond, the party from whom I bought the mill at Bonita; A. B. Hammond and W. H. or Henry Hammond. Fred Hammond died after I came to California, in 1901 or 1902, I think. George L. Hammond died a year or two later, 1903 or '04, perhaps later. Milton Hammond, who was a witness in this case, was a very distant relation. Then there was another witness, John C. Hammond, who was a double cousin. I was at Bonner at the time that the company was operating under the permit from the United States to cut timber, which has been offered in evidence. No charge was made by the Government for timber cut by the Big Blackfoot Milling Company under the permit introduced [522] in evidence here. The trees that were felled either by me or by the men who contracted for me on the Hellgate, were either hauled, dragged or driven by stream to the Bonita Mill and sawed up into timbers and all kinds of lumber and shipped. So far as I know, there was none destroyed and not utilized.

Cross-examination.

I was born in the Province of New Brunswick, Canada. I came to the United States in 1883. I was born in the year 1848. Prior to coming to this country, I worked on a farm until I was grown. I went to school, college and also taught school. I was a school teacher just immediately before I came to

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America. I had been teaching school eight or ten years in the Collegiate School, in Frederickton, in the Province of New Brunswick. That was a governmental school. I was engaged in teaching general subjects, English and Mathematics. I came to leave teaching and come to the United States because I wanted to change my occupation. I came direct from New Brunswick to Montana. I came at nobody's solicitation. Henry Hammond or W. H. Hammond had been out there for six months, or nearly a year before I came out and I came out with him, but not at his solicitation. Mr. A. B. Hammond was already there in business at Missoula. He had been in business there quite a number of years. For the first few weeks after I went to Montana, I did not do anything more than look around the country. I did not know whether I would stay in Montana. My first employment in Montana was with the Montana Improvement Company. Mr. Eddy and Mr. Bonner employed me to work for the Montana Improvement Company, and I had some talk with Mr. A. B. Hammond about it. As to [523] Mr. A. B. Hammond's relation to and duties with the Montana Improvement Company at that time, he had not very much to do with it. I think he was a sort of nominal manager. He was manager nominally, not actively, so far as I know. Mr. A. B. Hammond was actively engaged at that time in the mercantile business—in the Missoula Mercantile Company. As to being active manager and in charge of the business of the Missoula Mercantile Company at

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that time, I could not say anything more than Mr. Bonner and Mr. Eddy they were partners together. I don't know what connection Mr. A. B. Hammond had any more than he was one of the partners, along with Mr. Bonner and Mr. Eddy. They were there a good deal of the time and I saw them there at all times. I could not say that Mr. A. B. Hammond was just as much in charge of the business as either Mr. Bonner or Mr. Eddy. It struck me that Mr. Bonner had charge more than any one else. Mr. A. B. Hammond had certain duties and relations with the Missoula Mercantile Company. I saw him around the Missoula Mercantile Company's store. I saw him talking to the customers, doing business with customers. He had a certain charge over the clerks and others that were doing the work in the store. I often saw him talking to the clerks. In this first employment of mine by the Montana Improvement Company, my duties were to ship the lumber for the Northern Pacific, a lot of lumber that was left over from E. L. Bonner's contract with the Northern Pacific. I think that lumber had been taken over by the Montana Improvement Company. I was stationed at Wallace. I think no lumber was being cut at Wallace at that time. After I went to Wallace there was lumber cut there for the Montana Improvement Company. The Montana Improvement Company were [524] not operating the mills at Wallace when I went there at all. J. P. Katchin was operating it. The Montana Improvement Company was not sawing lumber when I went to work

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for them at Wallace. It had a lot of lumber on hand that had been sawed on this railroad work. It had been sawed by the other parties—not by the Montana Improvement Company. I went to Wallace in 1883 and my recollection is that the Montana Improvement Company commenced to saw lumber at Wallace in 1884. My duties were to ship the lumber out from these various mills. I billed it out for the Montana Improvement Company. As I recollect, the most of that lumber was shipped to the Northern Pacific for the completion of its works in Montana. It is my recollection that it was for the completion of its works in Montana. It is not a fact that a great deal of it was shipped to Great Falls possibly for the construction of the Northern Pacific Railroad; while I was there most of it was shipped for the completion of the work, such as station houses, round houses and section houses. That was during my early days there, my first year there, it went to the Northern Pacific. I remained at Wallace in charge of the Montana Improvement Company's business about two years and a half. Mr. W. H. Hammond was there a part of this same time. While he was there, his duties were looking after the mills that he ran there in 1884, as I recollect. He was attending to the operation of the mills. At the end of my two years and a half employment at Wallace, would bring me to early in the spring of 1886. The work played out. After I left Wallace I did not continue in the employment of the Montana Improvement Company. I was there for two years and a half, and

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then I ceased to be in its employ. [525] My work for the Montana Improvement Company ceased a few weeks before I bought the Bonita Mill. During those few weeks I was not employed by any one. I was looking around for something to do. It was during those few weeks that I consulted with Judge Marshall about the mineral character of these lands and I was carrying on negotiations with Fred A. Hammond for the purchase of the mill. It took me only three or four weeks to do that. Then I went to Bonita and ran the mill. I ceased actually running the mill at Bonita in the spring or early summer of 1891. After I quit running the mill at Bonita I went to Bonner. In my work at Bonner I had general charge of the office, attending to the shipments of lumber, billing the orders and carrying on the correspondence, general work of that kind, as an assistant to W. H. Hammond. At that time the Bonner Mill was run by W. H. Hammond under a lease. It may have been owned by the Blackfoot Milling and Manufacturing Company, but I did all my business with W. H. Hammond. I think I knew at the time I went to Bonner that the mill there was owned by the Blackfoot Milling and Manufacturing Company. As I said, though, all of my business was done with W. H. Hammond. Henry Hammond ceased to operate the mill at the end of 1891. There never was a period of time in there when the Blackfoot Milling and Manufacturing Company operated this Bonner Mill itself. Henry Hammond operated the mill under a lease until it passed into the hands of the Big

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Blackfoot Milling Company. I know that Henry Hammond was in full charge there until the Big Blackfoot Milling Company was formed. As to the final date of the expiration of his lease, I could not say. I know he ran it himself up until the end of 1891. I think the lease ran out at the end [526] of 1891 or the beginning of 1892 and it was taken over by the Big Blackfoot Milling Company. I don't know of any period of time when the Blackfoot Milling and Manufacturing Company ran that mill itself. I passed from the employment of Henry Hammond into the employment of the Big Blackfoot Milling Company. I remained in the employment of the Big Blackfoot Milling Company until the property was sold to Marcus Daly in 1898. The early negotiations for the sale of that property were conducted between W. H. Hammond and Thomas Hathaway on the one hand and Mr. Donohue, who represented Mr. Marcus Daly. I think the final closing of the negotiations was done by the parties I have mentioned with Mr. A. B. Hammond. I did not understand that A. B. Hammond was trustee and the stock was all in his name when it was sold to Marcus Daly. A. B. Hammond was a trustee for winding up the business. I could not say that he was a trustee to make the sale. My recollection is the stock was put in escrow in the First National Bank for Daly. I don't know positively whether it was put into Mr. A. B. Hammond's hands as trustee. I can't tell you how much per share was received for the stock of the Big Blackfoot Milling Company sold

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to Daly, but the whole sale netted about \$1,100,000.00. I don't think it was more than that. I don't think it amounted to \$1,800,000. I am only speaking from my recollection about \$1,100,000. I arrived at that by what I got out of it, my *pro rata*. I remained at Bonner after the sale until 1899, doing the same work I had done before and for the Big Blackfoot Milling Company. After they bought the stock, the name was never changed. After I quit working for the Big Blackfoot Milling Company I went to Kalispel, a town in North Montana. I was there for a year. I was working [527] for myself during that time. There were three or four of us bought a flour mill up there. We formed a partnership and engaged in the flour mill business. Mr. A. B. Hammond was not connected with me. As to how soon after I left the Big Blackfoot Milling Company, I again engaged in work for any of the corporations or partnerships in which Mr. A. B. Hammond was interested—in the latter part of the year 1900, I came to California—not with Mr. Hammond. He had probably been here before. I did not come here with him. Since then I have been connected with his company, both as a stockholder, officer and employee, and I still bear that relationship. As to the circumstances under which I bought the Bonita Mill from Fred A. Hammond, Fred A. Hammond was desirous of selling it. He was anxious to get rid of it. Negotiations were carried on between me and Fred A. Hammond for two or three weeks, as I have stated. My recollection is that Fred A. Hammond discussed the

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sale first with me. I would not call it approaching me. I never had any experience in the sawmill business prior to my coming to Montana in 1883. I had been a school teacher all my life. The practical experience in conducting a sawmill after I got to Montana and before I bought the Bonita Mill, was only as I saw the operations that were being carried on at Wallace in 1884. I had nothing exactly to do with the management of those mills; but I was familiar with the workings. It was right under my nose and my sight all the time. For the twenty-five or twenty-six thousand dollars I paid Fred Hammond, I bought the sawmill; I think I testified the other day that the mill, complete with barns, store, cook-house and railroad spurs, was worth between seven and eight thousand dollars. I also bought all of his teams, horses, logging trucks and logging equipment, a certain amount [528] of sawed lumber in his yard and quite a large quantity of logs that he had gotten out the winter before and had on hand. I bought in the spring and he had some logs there. As to the extent of Fred Hammond's operations prior to the time I bought the mill at Bonita—he had not sawed very much lumber, but he was getting ready. He had not been running for almost a year. During the winter he was shut down. The mill was shut down. He had been logging all winter, since August or September getting ready to operate the mill. He did not float any timber to the mill until the next spring. There were logs in the pond when I bought the mill. I don't know how many—half a

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million feet. I don't know off of what sections these logs came from. Some had been cut on the Cramer Gulch and some from over, I think, on section 11-11-16. There were no logs in the pond that had been cut on Rich's Gulch. They were cut but not brought to the mill. The winter before I think Mr. Rich had been logging up there for Fred Hammond. Very few logs had been cut in the vicinity of the mill on section 14-11-16 by Fred Hammond—a few to put up the buildings there. I would have to guess at, or make an approximation of, the amount of sawed lumber in the yard when I bought the Bonita Mill. I would say, at least, half a million feet. The lumber was all carefully inventoried, but that is twenty-five years ago. I should think there may have been at least around in the neighborhood of a million feet of board measure of logs and sawed timber at the mill when I bought it; and that timber and those logs had all been taken to the mill by Fred A. Hammond during the time he was running it. I don't know from what particular tracts of land that stuff was taken. When I went to examine the country along the [529] Hellgate, to determine whether or not I wanted to take up the proposition to buy that mill, there was then at least a million feet of timber that had been cut along there and taken to this Bonita Mill. No doubt some of the logs that I saw cut from these different sections that had been cut prior to the time I commenced operating the Bonita Mill, had been cut by Fred Hammond. A small amount of this old former cutting that I testified to on my direct

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examination had been done by Fred Hammond. I was familiar at that time with the timber that was usually used in making ties; a few ties were cut in the woods. It is not a fact that I could tell the difference between a tree that had been cut down to make into ties and a tree that had been cut for a saw log. I could not tell unless I saw some evidences on the ground. I know that ties are made right in the woods, and that in hewing them chips would be left on the ground in the woods where the ties were made; but they do not always make them that way. If there were no chips I could not tell whether they were made into ties or sawed into lumber, so I testified that from the stumps I could not tell whether trees had been cut for ties or saw logs. Possibly it might be that the stumpage of tie timber at that date was uniformly smaller than logging timber, but for piling and bridge timber it was larger. Ties were cut out of small stuff, but piling and bridge timbers were cut out of big stuff. In cutting trees for piling they cut off the top, so that they leave the top of the piling about eight or ten inches in diameter. I could not from the stump, or from the top if it had been left there, tell the difference between a tree that had been felled for a saw log and one that had been felled for piling. Eighteen or twenty inches in [530] diameter is about as large a tree as they would cut for piling—that is the diameter at the large end. That is, because any timber larger than eighteen or twenty inches in diameter would not fit in between the railings or guides. Sometimes in making piling

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they take the bark off the trees there in the woods and sometimes they would not. Saw logs are barked on one side right in the woods before they take them to the mill so as to run them down the chutes, that they will skid easier. That is almost the universal process. I could not tell from the debris on the ground the difference between logs that had been cut for sawing purposes and those that had been cut for piling purposes. I could not tell unless I was on the ground and saw them do it. I could not tell you from the stumps years later. If the chips were there on the ground I could tell whether the trees had been cut for ties or not, but the debris might have been burned up. I saw some places where debris was on the ground. They never cut a tree above eighteen inches for tie purposes. Of course, they might have cut a large tree for tie purposes and have left the butt logs. I testified that in my time when I was at Bonita, there was no fire. There might have been a fire there before I was there. I could not say whether I saw any evidences of any fire; I do not know that there was a big fire in through that country. I don't know that there was any fire which destroyed evidences of these cuttings. I don't know that there was ever any fire that burned over any of the sections of land involved in this suit. Prior to the time I bought the Bonita Mill I had been on sections 10, 2, 14 and 12, in township 11 north, range 16 west and on sections 18 and 22 in township 11 north, range 15 west. I was not on section [531] 26-11-15. I was on section 22-11-15 along the river.

(Testimony of G. W. Fenwick.)

As to my object in going over those sections before I bought the mill—I was riding on horseback through that country along the county road when I was negotiating with Fred Hammond. I went along there to see the opportunities there were for logging. I did not go back from the river any distance. I rode over the sections right close to the river to judge the amount of timber that might be on them. I did not make any estimate of the available amount of timber over from the town of Bonita to Tyler Gulch at the time I purchased the Bonita Mill. At that time I was looking for the handy logs along the river. I was looking for logs within a reasonable distance from the river. If I had gone miles back, the amount of timber would be very greatly increased. I did not make any close estimate at all of the amount of timber in the Hellgate from the crest of one hill to the other. I saw there was enough there to run my mill for a few years. I did not know any of the section lines or corners at that time, and the only reason I could say I was on section 10, or 12, or 2 or 14, is because I now locate it by natural objects, the same as the other witnesses have done here. There were no lines run there in my time. It was about the time I commenced to talk with Fred Hammond about the purchase of the Bonita Mill that I began to consult Mr. Thomas C. Marshall in regard to the act of June 3, 1878. No one suggested that I consult Thomas C. Marshall. My own sense suggested it. I realized the importance of it and that I should get proper advice on a matter of that nature. He told me of the

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act of June 3, 1878. I had heard of it before. He read it to me. The exact terms of the act and the exact description of the lands from which I was entitled to cut made an impression on me at the time, but I could not tell at this late date. I [532] understood that I was only entitled to cut from lands that were subject to entry under the mineral laws of the United States, as provided by the act. It must have been between the middle of May and the last of the month of May, in 1886, that I actually took over the control of the Bonita Mill and commenced to run it and it was pending the negotiations before I actually took over the mill, that I saw Mr. Marshall. Fred Hammond stayed there when I took control and gave me such assistance as he could, in a friendly way, after the deal was finally closed. I had charge there and was in possession of the works, but he kept coming backward and forward there off and on for some little time.

Q. He was there up until the middle of July?

A. At times he would come and go, as he saw fit.

(Witness Continuing:) I could not say whether I had more than one conference with Mr. Thomas C. Marshall in regard to my rights under the act of June 3d, 1878. I saw and talked with Mr. Marshall. I had heard discussions before I went to Fred A. Hammond, in regard to the law of 1878, and other people were operating and cutting under what I supposed was that same law. That was a matter of common discussion there at that time. Any advice I took I took from Mr. Marshall. He was employed

(Testimony of G. W. Fenwick.)

by me as my attorney for the purpose of advising me with regard to this act of June 3d, 1878, and my rights under it, and for other purposes, but that was one specific purpose. Mr. Marshall at the start invited my attention to some of these regulations. He explained to me the law of 1878. I considered at that time I understood it because I was operating under it all of the years I was there. In regard to the mineral [533] character of these lands, I had read the letter of Senator Teller describing what were considered mineral lands. I think Mr. Marshall also called my attention to the rules promulgated by Secretary Lamar on May 7, 1886. There was a lot of discussion at that time; I could not say; I think I was familiar with the Lamar rules. I think in September some new rules were put in force and I presume I discussed them with Mr. Marshall. I don't remember all of the details; that occurred twenty-five years ago. As to the provisions of the following section: "Second: The land from which timber is felled or removed, under the provisions of this act, must be known to be strictly and distinctly mineral in character and more valuable for mining than for timber or for any other purpose or use." At this late date I could not tell what particular section Mr. Marshall called to my attention. All I know about it is, I was acting under his advice and instructions at that time. I cannot remember the details as to the different sections that he read to me. I understood that part of the law providing that "timber, felled or removed, shall be strictly limited to

(Testimony of G. W. Fenwick.)

building, agriculture, mining and other domestic purposes." I don't know whether he called that particular provision to my attention or not, but I knew that. I don't know how I knew it. I could not say at this time whether the following section of the rules of the Secretary of the Interior was called to my attention: "All cutting of such timber for sale or commerce is forbidden, but for building, agriculture, mining and other domestic purposes, each person authorized by the act may cut or remove for his or her own use, by himself or herself, or by his or her or their own personal agent or agents only." As to the length [534] of time I spent in investigating the character of these lands along the Hellgate before I commenced cutting on them—during the two years and a half I was in the Hellgate Canyon I was up and down the canyon frequently. I did not have any particular point in mind during the two or three years that I was searching out to find the mineral or non-mineral character of these lands. I was not specially interested in those sections any more than other places. I was looking around for a good place where I could get timber.

Q. Tell the jury, in all the time that you knew section 10-11-16, what was there that enables you to say that that section was more valuable for mineral than for any other purpose?

A. I could not tell on section 10.

(Witness Continuing:) I did not see any myself on section 10. My recollection is that there was some prospecting on the north half of section 10.

(Testimony of G. W. Fenwick.)

That was during my early days at Bonita, after I commenced my operations; after I had determined that it was mineral land under the explanation of what constituted mineral land given by Senator Teller. I saw this prospecting there the summer of 1886. I think it was after I had commenced my operations there. I don't think I ever saw any prospecting up in section 2-11-16, in Cramer Gulch. I saw prospecting on section 14-11-16. That was shortly after I went to Bonita. Some parties were prospecting on Beaver Tail Hill right opposite to me. It was on the north side of section 14, adjoining section 11. I thought that section 14 was mineral land, the same as all that land around there.

Q. Don't you know that all out in the bottoms there [535] was nice bottom farming land, and ever since the land was surveyed and anyone could enter it, it was entered under the homestead laws of the United States and has been farmed from that day to this?

A. I saw some prospecting done there. Farming on some part of it. There was no farming on the island.

(Witness Continuing:) The sawmill and buildings were over on the island. The river branched at this point and the land between the branches was called the island. One branch was used as a sort of log pond. The prospectors sunk a hole on the ground on the sidehill on the north side of section 14-11-16. My recollection is they worked there about a month. It was abandoned afterwards. There was no work done on it in my time after that. I was not up there this summer at that place. It had all grown up with

(Testimony of G. W. Fenwick.)

brush, and I could not see it. I do not think there has ever been any mine there; nothing of any value taken from it that I know of. It was abandoned. I don't know where the next spot was that I saw any prospecting done in the Hellgate Canyon. There was a mining claim taken up by Tyler in section 23-11-15. I don't think that was in operation when I first went there. I was riding up and down that country all of the time. It was not being worked for mining purposes, that I recollect. It was partially a hay field. I don't know how long it remained a hay field. While I knew it, I do not think I ever saw a miner stick a pick in it for the purpose of mining. Prior to the time that I took charge of the Bonita Mill, I had seen no mining claims located on any of the ground involved in this suit. I saw mining claims east and west, at Wallace and Bearmouth. I don't think I at any time saw any mining claim located on any of the [536] lands involved in this suit. There was a mining claim at Carlin, or Nimrod, but that was along in 1894—about that time—quite a few years after I took charge. I don't think that placer mining claim was on any of the sections involved in this suit. My first impression as to my right to cut was based on Secretary Teller's letter, as I have already testified; it was based on what I believed to be the general mineral character of the country. I did not base my opinion on any definite mine. At Wallace, a few miles away, there was a mine, and I talked to people, old miners in the country. The Wallace mine was located at Wallace. It had been in operation several years when I bought

(Testimony of G. W. Fenwick.)

the Bonita Mill. It is seven or eight miles west of section 10-11-16. There were very extensive mining operations on Rock Creek for two or three years and a vast amount of money was spent there; that was called the Quigley Mine. They spent hundreds of thousands of dollars there, but it was never developed into a paying mine at that time. I don't think it is a paying mine to-day. The mine was abandoned, but whether it was a business failure because the mineral was not there, I don't know. Those Quigley operations were three or four miles from the land involved in this suit. Rock Creek is some three or four miles west of said section 10. I don't know how far up Rock Creek the Quigley operations were. The Quigley operations were not until after I commenced cutting in this vicinity. I could not say how long after I commenced cutting. There was nothing about the Quigley mine operations that caused me to determine that this land was mineral in character. When I came there in 1883 there were lots of old miners around Wallace and all through that country. As I recollect it, I think it was about 1884 or 1885, that I first found out there [537] was a Wallace Mining District. I don't know that I ever saw this Defendant's Exhibit "G," which purports to be the minutes of the meeting at which the Wallace Mining District was organized and its boundaries defined, before I saw it in the courtroom. I would not say that I did. I testified that I saw a number of affidavits. I saw them at Colonel Marshall's office. Those affidavits were sworn to before Mr. Marshall as Notary Public, but I am not certain about this

(Testimony of G. W. Fenwick.)

paper, Defendant's Exhibit "G." I don't know when I first saw it. At the time I took charge of the Bonita Mill, the land on section 14-11-16 was unsurveyed. I did not know what section of land I was on. No person settled on that land on section 14 for the purpose of claiming rights as a homesteader or pre-emptioner while I was there. I could not tell the date when I first learned I was on section 14. I don't remember now. I had a contract with Mr. Marcus Daly to furnish timber for the mine. In the contract with Mr. Daly I acted as his agent. Of course, I found the mill teams and other things and the price that he paid me was compensation for the agency. Mr. Daly had nothing to do personally with the operation of my mill. As his agent, I was to furnish him this lumber and saw this lumber and ship it to him. I had no contracts there with any other people to whom I sold lumber. I sold nearly all of my lumber to him; a small amount I sold to outside people. As to whether it was necessary for me to be appointed as his agent in order to sell him that lumber, that was a part of the conditions of the contract I entered into with him. The acts I performed for Mr. Daly were in sawing and furnishing him this lumber. He had no interest in the mill. I owned the mill and owned the lumber and I shipped the lumber to him. The checks he sent me in payment for the lumber I did not turn over to the [538] Missoula Mercantile Company. The checks came to me, to my address at Missoula. Mr. Winstanley kept my books in the upstairs office of the Missoula Mercantile Company's building. When the checks came

(Testimony of G. W. Fenwick.)

in, the parties sending them received credit for the checks before anything else was done with them, and they were eventually turned over, like all of the other checks, to the Missoula Mercantile Company, in payment of my bills—placed to my credit. The details of the business I did with Mr. Daly were conducted just the same as my business done with any other persons to whom I sold lumber. When [539] I quit Missoula, I spent the best part of a year before I went to Eureka. The Hammond people had no interests in Eureka when I went there. I was instrumental in getting Mr. Hammond interested in Eureka. I made a report of what I found in Eureka—I rather advised him to come there. I went there for the purpose of investigating property owned there by Mr. E. H. Vance, whom I had met in Missoula. He told me about this proposition in Eureka, and on the strength of that I went there. I went there to investigate it for myself, but I could not swing a proposition that big; I think I could have got other people interested in it than Mr. A. B. Hammond. Afterwards A. B. Hammond did swing the deal for me. I am in Mr. Hammond's company as a stockholder and an officer all these years since then.

Redirect Examination.

I testified as to a mine at Bearmouth. Bearmouth was the second greatest placer mining country in Montana. Gold had been taken out there since the '60's, amounting to millions of dollars. That was four or five miles from the extreme eastern end of my operations at Bonita. It is about four miles east

(Testimony of G. W. Fenwick.)

of section 26-11-15. The Bear Gulch mines were historical and a matter of interest to any person coming to Montana. I am vice-president of the Northern California Division of the Hammond Lumber Company. I and my family have one hundred shares of the first preferred stock and two hundred and forty-seven shares of the common stock. By my family, I mean my wife and myself. I am just giving you the figures from memory. The first preferred stock has a par value of one hundred dollars and the value of the common stock, that depends upon its earnings. One hundred dollars is the par value [540] of the common stock. In response to Mr. Hall's question, I spoke of Mr. Hammond's connection with the Missoula Mercantile Company in 1883; but if I said so, I must have made a mistake. The Missoula Mercantile Company was organized sometime in the summer of 1885. In 1883, Mr. Hammond was connected with Eddy-Hammond & Company, which continued up to 1885. What I have said about 1883 refers to Mr. Hammond's relations to the Eddy-Hammond Company and not to his relations with the Missoula Mercantile Company. There were other stores in Missoula, general merchandise stores, in the years I was operating at Bonita. There were three or four large stores, besides a lot of small ones. I mean stores that carried goods to the extent of perhaps one hundred thousand dollars. During the time I was operating the Bonita Mill, I paid the taxes on my property myself. They were assessed to me. The Montana Improvement Company did not oper-

(Testimony of G. W. Fenwick.)

ate any mills either in Deer Lodge County, or in Missoula County, or in the State of Montana, other than those Wallace Mills. It acquired the two Wallace mills in the fall of 1884. They were only small portable mills. Their capacity would average ten or twelve thousand feet a day; each mill about ten thousand feet a day. The Montana Improvement Company first began to operate them the last of '84 or the early part of '85. J. P. Katchin owned these mills prior to their acquisition by the Montana Improvement Company. After their acquisition by the Montana Improvement Company, these mills were engaged in cutting material for completing the construction of the Northern Pacific Railroad—depots, roundhouses and snow-fences; an immense amount of stuff like that; that was the kind of material shipped out while I was there. I came to Bonner in the summer of 1891. The shipments were made in the name of [541] W. H. Hammond. Concerning the testimony offered here to the effect that shipments arrived at Helena from the Blackfoot Milling and Manufacturing Company, this company had a number of small mills in the Bitter Root Valley. As to whether or not I know that that corporation shipped lumber from these mills in the Bitter Root Valley to Helena, I saw cars go by that were placarded from the Blackfoot Milling and Manufacturing Company. I could not say of my own knowledge. I did not see the lumber loaded on the cars and I did not bill it myself. It is a matter of my own knowledge that the Blackfoot Milling and Man-

(Testimony of G. W. Fenwick.)

Manufacturing Company was operating mills in the Bitter Root Valley. I could not tell the particular sections that the lumber and logs on hand at the Bonita Mill when I purchased same came from, because a part of them came down the river through this flume into the pond. Some of them were hauled there during the winter season. They came from different sections, different localities. I know the general locations of where those logs that came down the river and into the flume and pond came from. Some of them came down from what was called Rich's Gulch. They were logged there by Rich the winter before; that would be on section 7-11-15; it was not on section 8-11-15. The mouth of the gulch is on section 7. Some of them came from over on section 11-11-16, and some of them came out of section 2-11-16. A half or three-quarters of a mile of Rich's Gulch is on section 7. The logs that were at the mill when I brought out Fred Hammond, which had come down the flume, were all cut contiguous to the Hellgate River. Concerning the debris on the ground left by the peeling of trees, by the making of ties and with reference to my last visit, which was in September, 1912—the ground that I went over and examined, a [542] great deal of the debris had been burned by fires that had gone through there since I left there fifteen or twenty years ago. What was not burned had been rotted away and there was no debris left there at all. It had disappeared. I know of no means whereby I could ascertain at this late date where debris has been either burned or rotted away

(Testimony of G. W. Fenwick.)

whether or not the stump that was there represented a tree that had been felled for logging at the mill or for other purposes connected with the building of a railroad. I went on the lands last September. Mr. C. E. Woodworth, who has testified here, pointed out the lines to me. In reference to the contract of agency, I had with Mr. Daly, which I have testified to, there was a money compensation, first of all, and I am quite sure there was an indemnity clause in that contract. That indemnity clause was to save me harmless against any claims for stumpage that might come hereafter.

Recross-examination.

I needed the protection of the indemnity clause given by Mr. Daly for stumpage, for I knew that if for any reason that land should be held not to be mineral land, the railroad company would claim all of the odd sections.

Q. You did have a belief at that time that you might be held responsible for cutting from these lands because they were not mineral, didn't you?

A. I did not want to take any chances at all.

Q. And you were not taking any chances because you were given this indemnity clause, were you not?

A. It might have turned out differently later on, I did not know.

Q. And you were protecting yourself, and you were not relying solely then on the fact that the act of 1878 allowed you to cut on mineral land? [543]

A. I think I did.

Q. You were not relying on that solely, were you?

(Testimony of G. W. Fenwick.)

A. I might not have afterwards.

Q. You were relying principally upon the indemnity clause in your contract with Mr. Daly?

A. I could not interpret the law.

Q. And you don't pretend to interpret it now?

A. No; but I acted according to my best judgment at that time.

Q. And you at that time asked Mr. Daly to hold you harmless from cutting upon the public lands?

A. I wanted to fortify myself on all sides.

(Witness Continuing:) Mr. A. B. Hammond is president of the Hammond Lumber Company, which is the company that I am now an officer of. Thomas Hathaway was an officer of the Montana Improvement Company, but I don't know what office he held. As to my financial condition when I arrived in Wallace, in 1883 or 1884, I brought a certain amount of money with me. I could have lived a year without doing anything, at least. I left certain property back in Canada, which I afterwards turned into money. I afterwards got between two and three thousand dollars for it. That was in 1884, after I came to Missoula. I think I had \$2,000 in money in 1885 when I was at Wallace. I had no other property. [544]

Q. I ask you to look at a certified copy of your assessment list as taken from the assessment-roll of Missoula County, Montana, for the year 1885.

A. The total amount appears to be \$580.00.

Q. You turned in your assessment list that year yourself, didn't you?

(Testimony of G. W. Fenwick.)

A. I forget, perhaps I did—you say this was for 1885?

Q. Yes.

A. I may have turned it in direct or authorized Mr. Moser or Mr. Winstanley of Missoula to do it for me.

Q. And if you authorized anybody to do it for you, you authorized somebody that was familiar with your business and your property rights?

A. I may have, I could not tell. We were not always assessed for the full value of our property, and especially we were not in those early days in Montana.

Mr. WHEELER.—Do you know whether or not your assessment for that year was made up by the assessor or by yourself, or by someone else for you?

A. I could not tell at this late date.

Thereupon plaintiff offered in evidence certified copy of said assessment list and the same was received in evidence and marked "Government's Exhibit No. 12"; and the said assessment list reads as follows: Wagons and carriages, 1, \$50.00; amount of money \$500.00; watches, 1, \$50.00; No. polls 1, age 37; total amount \$580.00. Total amount of taxes paid \$20.95. [545]

My recollection is that the Montana Improvement Company ceased to saw lumber at the Wallace Mills in 1885. Some lumber was sawed in 1885. They were closed about that time. I spent some time in Helena and while there, was employed part of the time by Mr. B. H. Coombs, who was running a lumber

(Testimony of G. W. Fenwick.)

yard there. Mr. A. B. Hammond did not have any interest in that lumber yard, that I know of. I have no information that he did. I don't know.

Redirect Examination.

Concerning the indemnity clause in my contract with Mr. Marcus Daly, I thought this question of whether or not the land was mineral land, might be a question of law as well as a question of fact. The reason I took this provision of indemnity in my contract with Mr. Daly was, to meet the possibility at a later day, if for any reason it should be decided not to be mineral land, and hence the railroad company would come in and claim every alternate section.

Mr. WHEELER.—That is all, Mr. Fenwick. I next offer in evidence certified copies of certain assessments for taxes for the years 1886 to 1891.

Mr. HALL.—What are they?

Mr. WHEELER.—Mr. Fenwick's taxes at Bonita.

Mr. HALL.—No objection.

Mr. WHEELER.—For the year 1886, without reading any unnecessary part, "Name, George W. Fenwick; Postoffice address, Bonita; amount of merchandise, \$5,200; amount of capital invested in manufactures, \$4,000; horses, 16, \$1,120; oxen and steers over two years old, 12, \$360; hogs, 3, \$12; wagons and carriages, 4, \$120; amount of money, \$1,000; watches, 1, \$40; clocks, 1, \$3; total amount, \$11,855." [546]

(Defendant's Exhibit No. H-1.)

Mr. WHEELER.—Assessment-roll for the year 1887.

(Testimony of G. W. Fenwick.)

“George W. Fenwick, Postoffice address, Bonita; by whom listed, self; amount of capital in manufactures, \$2,000; horses, 12, \$1,200; mules and asses, 1, \$100; oxen and steers, two years old, 5, \$250; value of stocks subject to indemnity tax, \$1,550, raise on sawmill from \$2,000 to \$3,000; stock shares, \$1,000; lumber \$760; all other property, \$350; total amount of assessment, \$4,660.”

(Defendant's Exhibit No. H-2.)

Mr. WHEELER.—Assessment-roll for the year 1888.

“George W. Fenwick, Postoffice address, Bonita; value of merchandise \$2,900; amount of capital in manufactures, \$1,500; 22 horses, \$2,200; hogs, 3, \$10 wagons and carriages, 5, \$200; watches and clocks, 1, \$50; all other property, \$280; total \$7,190.”

(Defendant's Exhibit No. H-3.)

Mr. WHEELER.—Assessment-roll for 1889.

“Name, George W. Fenwick; Postoffice address, Bonita; age 42; one if \$9,200 and underneath \$5,200, and then \$200 and \$210; value of lots, \$400 and \$410; toll roads, bridges and so forth, \$533, \$547;—the total amount of the assessment being \$10,830.”

(Defendant's Exhibit No. H-4.)

Mr. WHEELER.—Assessment-roll for 1890.

“Name, George W. Fenwick, (Reading the items) total value of property \$10,550.”

(Defendant's Exhibit No. H-5.) [547]

[Deposition of William K. Wills, for Defendant.]

Defendant offered and read in evidence the deposition of WILLIAM K. WILLS, a witness

(Deposition of William K. Wills.)

called and sworn on behalf of the plaintiff, as follows:

Direction Examination.

(By Mr. HALL.)

I reside at Baird, Montana; I am postmaster up there. I have been such for three years. My occupation is farming. I have been living in the vicinity of Baird since May 24, 1894. I followed mining as an occupation once. I worked in quartz mines between six and seven years in Montana. First of all, at Gregory, which is about twenty miles from this city (Helena). I worked there two months; [548] I was a laborer in a mine. They had a smelter up there; the ore was treated right there; it was a fully developed and going mine; I also worked in the Granite Mountain, which was a quartz mine. I never did any work in placer mines. My knowledge of mining, and quartz mining in particular, has been acquired by practical mining work. I think I worked something over four years in the Granite Mountain mine. The Granite Mountain mine was silver, but I believe the Gregory was silver and I think lead. I have had some experience in prospecting and locating mining ground. My house is on section 7, township 11 north, range 15 west. I am familiar with section 6, in township 11 north, range 15 west, in the State of Montana. I have been over the same; if I understand right, that is the section where there is a lake right on the section line, between five and 6. I prospected on section 7, township 11 north, range 15 west, and we did half

(Deposition of William K. Wills.)

a day's work prospecting on the adjoining section 8. That is all the prospecting I did. We did a hundred dollars worth of work on section 7. There were three of us interested. A man by the name of E. H. Price was associated with me in that venture. We hewed our trees and our corner posts, marking the boundaries of the claim on section 7 that we claimed under the general mining laws of the United States and attempted to comply with the regulations in regard to marking and posting the boundaries of mining claims. We did not sink any shaft. We excavated more like an open quarry than anything else—it was loose rock. I guess we went in ten or twelve feet, to the best of my knowledge; we never measured it, but we did our work there. As to whether we found any ore in that tunnel, we got an assay and we brought in a sample to be assayed. We got a trace of [549] . gold; that was all.

Q. From your experience as a mining-man, was there a sufficient showing of mineral in place to justify an experienced, prudent miner in expending work and labor and money thereon, with a reasonable expectation of producing a paying mine from the ground?

A. When we got the return from the assayer, it discouraged us and we dropped it.

(Witness Continuing:) This partner of mine, he had another claim on section 7 right east of it; I was not interested in that. There was no mine on section 7 at this time. There was no mineral claims located on that section at this time. There has been

(Deposition of William K. Wills.)

no ore taken out and shipped from section 7 to my knowledge. I have been familiar with this ground in section 7 all the time since I located my mining claim. I have been over it and across it and went up and down and every other way.

Q. From your knowledge of the entire section there and from your experience as a miner, is section 7 mineral or nonmineral in character?

A. Well, we gave it up for the want of mineral; we could not see that it would justify us; I don't see what else I could term it.

(Witness Continuing:) I made an examination of section 8, in the same township and range, for the purpose of determining its mineral or non-mineral character. This same man Price and I went up on section 8, on a particular ridge there, and blasted in a kind of a rock we thought was mineral bearing; we did not discover any ore there; we blasted the rock and we had nothing left; it was [550] a kind of boulder, it seemed to set right on the top of the ridge. That was in the southwest forty of the entire section, the southwest quarter of the southwest quarter. Afterwards, I entered a portion of section 8 under the General Land Laws of the United States as a timber and stone claim—one hundred and sixty acres. My wife also acquired a portion of section 8 from the Government as a timber and stone claim; another part of section 8 I bought at public sale at the Land Office; it was advertised for sale. I bid on it; it was sold as an isolated tract, if I understand the term. My timber and stone entry and my wife's

(Deposition of William K. Wills.)

timber and stone entry, each contained one hundred and sixty acres, and there were one hundred and twenty acres in the isolated tract, so that in all we acquired in section 8 four hundred and forty acres, all of the entries being such that we could acquire title only because of the non-mineral character of the land. I believe I made a non-mineral affidavit covering the land in my timber and stone entry, as also did my wife, and the affidavit read it was more valuable for stone and timber than it was for mineral. I am familiar with some of the lands lying along the Hellgate River in township 11 north, ranges 15 and 16 west, particularly familiar with sections 2, 10 and 14, in township 11 north, range 16 west, and sections 6, 8, 18, 20, 22, 23 and 26, in township 11 north, range 15 west. I could not say that I am familiar with all those sections, but there is a part of them that I am familiar with. I am familiar with that general scope of country that extends from about the station Bonita on the Northern Pacific Railroad to a distance of some nine or ten miles east. I have been all over the country. I have been along the road there and all those mountains. [551]

Q. From the crest of the mountain on the east of the valley to the crest of the mountain on the west of the valley, extending along it for a distance of ten or twelve miles east of the station of Bonita, do you know of any mines that are now in operation in that country?

A. At Copper Cliff there is some mines there; I

(Deposition of William K. Wills.)

don't know whether that is out of the range or not; I don't know where Copper Cliff is located on that map.

(Witness Continuing.) Copper Cliff is up some ten or twelve miles north through Cramer Gulch and Cramer Gulch starts in just north and east of Bonita; the mouth of Cramer Gulch starts out of the Hellgate Valley in the vicinity of Mr. Cook's house. Copper Cliff, I think, is some ten or twelve miles to the north of that, over the crest of the range. I visited that place once. I went up there and down on the other slope, a short distance on the north side. I do not know of any mines by the river or railroad in the Valley of the Hellgate and along the mountains on either side immediately adjoining the Hellgate River for a distance of ten or twelve miles east of Bonita.

Q. As long as you have been there, have you ever observed men prospecting or attempting to locate mines throughout that section?

A. Why, there are some mines located at Dry Gulch right close to the railroad station on the Northern Pacific called Nimrod.

(Witness Continuing:) These are upon the north side and a little west of Nimrod. They are away up in that gulch up on the side hill. I have seen where they prospected there. Nimrod is west [552] of Tyler Gulch. The station of Nimrod lies about a mile and a half from the mouth of Tyler Gulch, making a rough guess at it. From these prospects that I have seen located on the mountain

(Deposition of William K. Wills.)

north of Nimrod, I have never seen any ore that has been shipped or any mining carried on, just prospecting.

Cross-examination.

(By Mr. BURNETT.)

There was a copper prospect on the west fork of Cramer Creek. I could not tell the section it is in, but it is on an odd section because there is some dispute about it. Making a rough guess, I would guess that by the road, the prospect would be about three and a quarter or four miles from the Hellgate River, but straight across from the mouth of Cramer Creek, it would be probably two miles. It is a number of years now since that has been prospected. The parties prospecting still actively claim it. He has been there since he started a number of years ago up to the present time. I hear him talking about doing the assessment work; I am acquainted with the man who claims it. I knew there was a placer mining excitement about half a mile west of Carlin since I have been there. I remember Steele. I know that he did some work there on the placer mine and that they called it a placer claim. I also knew of another copper mine about a mile west of that operated by a man by the name of Kirby. I know that there has always been prospecting in that country, especially placer prospecting, down in the Hellgate River. They prospected there at different times; that was done about the time I struck there first, about 1895, that the placer excitement was there. There was no excitement the first year

(Deposition of William K. Wills.)

I was there; it came up after, I could not tell you [553] exactly the date, but to the best of my knowledge it was along about 1895.

Redirect Examination.

(By Mr. HALL.)

In all of the time that I have been there, all engaged in this placer mining in the bed of the creek gave it up and there is not any place along the Hellgate River, in either one of those townships, any man that is doing placer mining, that I know about. All the placer mining that was done there was not confined to the immediate bed of the Hellgate River and its shores—it was not right down level with the immediate bed, I don't think; it was right down in the gulch, a short distance. The operations that Steele worked there was on the north side of the river, up Dry Gulch. I was there when they were working those operations of Steele. It was along the fall of the year—I don't know how long he continued to work there; two or three months, some such matter as that. He or no other man ever placered there in that particular spot since then to my knowledge. Joe Kirby was on the opposite side of the creek. It was in a gulch right close to the river, but it stood up some twenty-five feet from the water. I think Kirby must have been operating there about 1896 or 1897. I know it was when I first went there that that thing came up and died out again. There has been no work done there since to my knowledge. The mine location that Mr. Burnett spoke of on the left-hand fork of Cramer Gulch

(Deposition of William K. Wills.)

is known as what is the Gill location. I heard Gill speaking about his mine a short time ago, about his doing his assessment work on it. Gill has never shipped any ore from there, as far as I know. I never examined it [554] myself. I talked with him and that is all I know about it.

Recross-examination.

(By Mr. BURNETT.)

Concerning this claim of Steele, I noticed down there at the river when Steele was working that claim a large wooden flume. That was quite an expensive construction. Mr. Steele told me it was built to assist in working that mine. I never saw the water come through the flume; I was there when they were building the flume and they informed me it was for this placer mine. I could give you a rough estimate, so you could figure out the cost of that flume. I think the flume was made out of foot-boards; there was a board on each side and a bottom, and that is as close as I could give it, but you can figure it out. I don't know whether it would cost in the neighborhood of \$5,000.00. I don't know how many thousand feet of lumber there is there; it cost lots of money to pack it up on the hill.

Redirect Examination.

(By Mr. HALL.)

The Steele flume was used for placer mining just that fall, if it was used at all. I never saw it used for placer mining, but the joke was when they turned the water in it ran the other way. I never

(Deposition of William K. Wills.)

saw them take any placer gold out of that flume, and it has been abandoned for the last twelve or fourteen years and the flume is rotten and fell down the mountain. [555]

Thereupon defendant offered and read in evidence certified copies of notices of locations of mining claims situated in the said Wallace Mining District, which said notices are respectively in the words and figures following, to wit:

**[Exhibit—Notices of Location of Mining Claims in
Wallace Mining District, etc.]**

Medicine Lode.

Notice of Location.

Medicine Lode Claim, Wallace Mining District.

Missoula County,

Territory of Montana,—ss.

Notice is hereby given that the undersigned has this 27th day of July, 1878, located 1500 feet in length and 600 feet in width on the above quartz lode mining claim, bearing gold, silver, copper and other metals situated in the mining district, county and territory aforesaid, together with all mineral veins contained within the following described metes and bounds, to wit: Beginning at this notice and running 300 feet west, thence 750 feet in a northern direction, thence 600 feet in an eastern direction, thence 1500 feet in a southerly direction, thence 600 feet in a western direction, thence 750 feet in a northern direction connecting with the center of the claim, comprising 1500 feet in a north and south direction and

300 feet in a east and western direction from the center of discovery shaft, and including surface ground 300 feet in width on each side of the center of said lode, the corners of said claim being marked by posts firmly set in the ground, so that its boundaries can be readily traced. A copy of this notice was posted at the discovery shaft on said claim on the 27th day of July, 1878.

(Signed) W. H. ERSKINE,
JAMES HOUSE,
MATT COLEMAN,
JOHN FREDLINE,
Claimants. [556]

Montana Territory,
Missoula County,—ss.

The undersigned, being first duly sworn, on oath, says that he is of lawful age, a citizen of the United States, and that the foregoing notice by him subscribed is a true copy of the original notice of location of the claim above described, as posted at the Discovery Shaft thereon on the day therein stated.

(Signed) JAMES HOUSE.

Subscribed and sworn to before me this 12th day of August, 1878.

FRANK H. WOODY,
County Recorder.

Received and filed for record on the 12th day of August, 1878, at 9 o'clock A. M.

FRANK H. WOODY,
County Recorder.

Territory of Montana,
County of Missoula,—ss.

I, Alvin Lent, County Clerk and Recorder of Missoula County, Montana Territory, do hereby certify the above and foregoing to be a full, true and correct copy of a mining location, together with all the indorsements thereon, as the same appears of record in my office.

WITNESS my hand and the seal of Missoula County, affixed this 9 day of June, 1888.

[Seal]

ALVIN LENT,
County Clerk and Recorder.

By Gust Moser,
Deputy Clerk. [557]

Extension of the Hidden Treasure Lode.

Notice of Location.

Extension of Hidden Treasure Claim.

Wallace Mining District, Missoula County, Montana
Territory.

Notice is hereby given that the undersigned have this 12th day of August, 1878, located 1500 feet in length and 600 feet in width on the above-named quartz lode mining claim, bearing gold, silver, copper and all other metals contained therein within the following described metes and bounds, to wit: Beginning at the center S. W. stake H. T. Lode, running N. W. 300 feet to S. W. corner stake H. T. thence S. W. 1500 feet to stake marked same thence N. E. 600 feet to tree marked same thence N. E. 1500 feet to S. E. corner of H. R., thence N. W. 300 feet to the place of beginning, comprising 900 feet in a N. W.

direction, and 600 feet in a S. W. direction from the center of Discovery shaft and including surface ground 300 feet in width on each side of the center of said lode. A copy of this was posted at Discovery shaft on the 13th day of August, 1878.

(Signed) EUGENE LENT,
JOHN U. McKAY,
Claimants.

Montana Territory,
Missoula County.

The undersigned being first duly sworn on oath says that he is of lawful age, a citizen of the United States and that the foregoing notice by him subscribed is a true copy of the original notice of location of the claim described as posted at the Discovery shaft thereon on the day therein stated.

(Signed) EUGENE LENT. [558]

Subscribed and sworn to before me this 13th day of August, 1878.

FRANK H. WOODY,
County Clerk.

Filed for record on the 16th day of August, 1878,
at 10 o'clock A. M.

FRANK H. WOODY,
County Recorder.

Territory of Montana,
County of Missoula,—ss.

I, Alvin Lent, County Clerk and Recorder of Missoula County, Montana Territory, do hereby certify the above and foregoing to be a full, true and correct copy of a mining location, together with all

the indorsements thereon, as the same appears of record in my office.

WITNESS my hand and the seal of Missoula County, affixed this 9 day of June, 1888.

[Seal]

ALVIN LENT,
County Clerk and Recorder.
By Gust Moser.

Clipper Lode.

Notice of Location.

Clipper Lode Claim.

Wallace Mining District, Missoula County, Territory
of Montana.

Notice is hereby given that the undersigned has this 14th day of August, 1878, located 1500 feet in length and 600 feet in width—on the above-named quartz lode mining claim, bearing gold, silver, copper and other metals, situated in the [559] mining district, county and territory aforesaid, together with all mineral veins contained within the following described metes and bounds, to wit: Beginning at the northern centre end stake running thence southwest 300 feet, having the North Trail Creek as southeast corner, running thence 1500 feet to tree blazed and marked S. N. W. 600 feet, the stake marked, thence northeast 1500 feet to the North Trail Creek, thence down said creek to the place of beginning, comprising 1500 feet in a northerly and southerly direction and including surface ground 300 feet in width on each side of the centre of said lode.

(Signed) EUGENE LENT,
JOHN U. McKAY,
Claimants.

Montana Territory,
Missoula County.

The undersigned being first duly sworn on oath says, that he is of lawful age, a citizen of the United States and that the foregoing notice by him subscribed is a true copy of the original notice of location of the claim described as posted at the Discovery Shaft thereon on the day therein stated.

(Signed) EUGENE LENT.

Subscribed and sworn to before me this 16th day of August, 1878.

FRANK H. WOODY,
County Clerk.

Filed for record on the 16th day of August, 1878,
at 11 o'clock A. M.

FRANK H. WOODY,
County Recorder. [560]

Territory of Montana,
County of Missoula,—ss.

I, Alvin Lent, County Clerk and Recorder of Missoula County, Montana Territory, do hereby certify, the above and foregoing to be a full, true and correct copy of a mining location, together with all the indorsements thereon, as the same appears of record in my office.

WITNESS my hand and the seal of Missoula County, affixed this 9 day of June, 1888.

[Seal]

ALVIN LENT,
County Clerk and Recorder.

By Gust Moser,
Deputy Clerk.

Free and Easy Lode.

Notice of Location.

Free and Easy Lode Claim.

Wallace Mining District, Missoula County, Montana
Territory.

Notice is hereby given that the undersigned has August 15, 1878, located 1500 feet in length and 600 feet in width on the above-named quartz lode mining claim, bearing gold, silver, iron and other metals situated in the mining district, county and territory aforesaid, together with all mineral veins contained within the following described metes and bounds, to wit: Beginning at east centre stake, running thence southeast 300 feet to corner, thence southwest 600 feet to northeast corner of Petrel lode northwest 600 feet, to corner of same lode, thence northeast 1500 feet to corner stake marked same, thence southeast 300 feet to place of beginning, comprising 1500 feet in a southwesterly direction and ——— feet in a ——— direction, from the centre of discovery shaft and including surface [561] ground 300 feet in width on each side of the centre of said lode. The corner of the said claim being marked by posts firmly set in the ground so that its boundaries can be readily traced. A copy of this notice was posted at the discovery shaft on said claim on the 15th day of August, 1878.

(Signed) EUGENE LENT,
THOMAS ANDREWS,
Claimants.

Montana Territory,
Missoula County.

The undersigned being first duly sworn says, that he is of lawful age, a citizen of the United States and that the foregoing notice by him subscribed is a true copy of the original notice of location of the claim described and posted at the discovery shaft thereon on the date therein stated.

(Signed) EUGENE LENT.

Subscribed and sworn to before me on this 16th day of August, 1878.

FRANK H. WOODY,
County Clerk.

Filed for record on the 16th day of August, 1878,
at 11 o'clock A. M.

FRANK H. WOODY,
County Recorder.

Territory of Montana,
County of Missoula,—ss.

I, Alvin Lent, County Clerk and Recorder of Missoula County, Montana Territory, do hereby certify the above and foregoing to be a full, true and correct copy of a mining location, together with all the indorsements thereon, as the same appears of record in my office.

WITNESS my hand and the seal of Missoula County, [562] affixed this 9 day of June, 1888.

[Seal] ALVIN LENT,
County Clerk and Recorder.

By Gust Moser,
Deputy.

Comstock Lode No. 2.

Notice of Location.

Comstock No. 2 Lode Claim.

Wallace Mining District, Missoula County, Territory
of Montana.

Notice is hereby given that the undersigned have this fifth day of August, 187—, located 1500 feet in length and 600 feet in width on the above-named quartz lode mining claim, bearing gold, silver, copper, tin and other metals situated in the mining district, county and territory aforesaid, together with all mineral veins contained within the following described metes and bounds, to wit: Beginning at the stake of centre of discovery shaft and running east 300 feet, thence 300 feet west from discovery shaft, thence 750 feet in a northerly direction, thence east 600 feet, thence 1500 feet in a southern direction, thence 600 feet west, thence 750 feet in a northern direction to the place of beginning, comprising 1500 feet in a north and southern direction and 300 feet in a east and western direction from the centre of discovery shaft and including surface ground 300 feet in width on each side of the centre of said lode, the corners of said claim being marked by posts firmly set in the ground, so that its boundaries can be readily traced. A copy of this notice was posted at the discovery shaft on the said claim on the 5th day of August, 1878.

JAMES HOUSE,

JOHN U. McKAY,

Claimants. [563]

Montana Territory,
Missoula County.

The undersigned being first duly sworn on oath says, that he is of lawful age, a citizen of the United States and that the foregoing notice by him subscribed is a true copy of the original notice of location of the claim above described as posted at the discovery shaft thereon on the day therein stated.

(Signed) JAMES HOUSE.

Subscribed and sworn to before me this 12th day of August, 1878.

FRANK H. WOODY,
County Clerk.

Filed for record on the 12th day of August, 1878,
at 9 o'clock A. M.

FRANK H. WOODY,
County Clerk.

Territory of Montana,
County of Missoula,—ss.

I, Alvin Lent, County Clerk and Recorder of Missoula County, Montana Territory, do hereby certify the above and foregoing to be a full, true and correct copy of a mining location, together with all the indorsements thereon, as the same appears of record in my office.

WITNESS my *hand the* seal of Missoula County, affixed this 9 day of June, 1888.

[Seal]

ALVIN LENT,
County Clerk and Recorder.

By Gust Moser,
Deputy. [564]

Last Chance Lode.

Notice of Location.

Last Chance Lode Claim.

Wallace Mining District, Missoula County, Territory
of Montana.

Notice is hereby given that the undersigned have the thirtieth day of July, 1878, located fifteen hundred feet in length and six hundred feet in width on the above-named quartz lode mining claim, bearing gold, silver, copper and other metals situated in the mining district, county and territory aforesaid, together with all mineral veins contained within the following described metes and bounds, to wit: Beginning at three within a few feet of discovery hole, running thence three hundred feet west, thence seven hundred and fifty feet north, thence six hundred feet in an easterly direction, thence fifteen hundred feet south and thence six hundred feet west, thence seven hundred and fifty feet to the place of beginning, comprising fifteen hundred feet in a north and southern direction and three hundred feet in an eastern and western direction from the centre of discovery shaft and including surface ground three hundred feet on each side of the centre of the said lode, the corner of said claim being marked by posts firmly set in the ground so that its boundaries can be readily traced. A copy of this notice was posted at the discovery shaft on said claim on the 30th day of July, 1878.

(Signed) W. H. ERSKINE,

JAMES HOUSE,

JOHN FREDLINE,

Claimants.

Montana Territory,
Missoula County.

The undersigned being first duly sworn on oath [565] says: that he is of lawful age, a citizen of the United States and that the foregoing notice by him subscribed is a true copy of the original notice of location of the claim above described as posted at the discovery shaft thereon on the day therein stated.

(Signed) JAMES HOUSE.

Subscribed and sworn to before me this 12th day of August, 1878.

FRANK H. WOODY,
County Recorder.

Received and filed for record on the 12th day of Aug. 1878, at 9 A. M.

FRANK H. WOODY,
County Recorder.

Territory of Montana,
County of Missoula,—ss.

I, Alvin Lent, County Clerk and Recorder of Missoula County, Montana Territory, do hereby certify the above and foregoing to be a full, true and correct copy of a mining location, together with all the indorsements thereon, as the same appears of record in my office.

WITNESS my hand and the seal of Missoula County, affixed this 9 day of June, 1888.

[Seal]

ALVIN LENT,
County Clerk and Recorder,

By Gust. Moser,
Deputy. [566]

Ophir Lode.

Notice of Location.

The Ophir Lode Claim.

Wallace Mining District, Missoula County, Montana
Territory.

Notice is hereby given that the undersigned have this 6th day of August, 1878, located fifteen hundred feet in length and six hundred feet in width on the above-named quartz lode mining claim, bearing gold, silver, copper, tin and other metals, situated in the mining district, county and territory aforesaid, together with all mineral veins contained within the following described metes and bounds, to wit: Beginning at the stake of center of discovery shaft and running east 300 feet, thence from shaft running west 300 feet; thence 300 feet in a northern direction, thence 600 feet in an eastern direction, thence 1500 feet in a southern direction, thence 600 feet in a western direction, thence 1200 feet in a northern direction to place of beginning, comprising 1500 feet in a northern and southern direction and 300 feet in width on each side of the center of said lode, the corners of said claim being marked with posts firmly set in the ground so that its boundaries can be readily traced. A copy of this notice was posted on discovery shaft on said claim on the 6th day of August, 1878.

JAMES HOUSE,
JOHN U. McKAY,
Claimants.

Montana Territory,
Missoula County.

The undersigned being first duly sworn, on oath, says, that he is of lawful age, a citizen of the United States, and that the foregoing notice by him subscribed is a true copy of [567] the original notice of location of the claim above described as posted at the discovery shaft thereon on the day therein stated.

(Signed) JAMES HOUSE.

Subscribed and sworn to before me this 12th day of August, 1878.

FRANK H. WOODY,
County Clerk.

Filed for record on the 12th day of August, 1878,
at 9 o'clock A. M.

FRANK H. WOODY,
County Recorder.

Territory of Montana,
County of Missoula,—ss.

I, Alvin Lent, County Clerk and Recorder of Missoula County, Montana Territory, do hereby certify the above and foregoing to be a full, true and correct copy of a mining location, together with all the indorsements thereon, as the same appears of record in my office.

WITNESS my hand and the seal of Missoula County, affixed this 9 day of June, 1888.

[Seal]

ALVIN LENT,
County Clerk and Recorder.

By Gust Moser,
Deputy.

Beecher Lode.

Notice of Location.

Beecher Lode Claim.

Wallace Mining District, Missoula County, Territory of Montana.

Notice is hereby given that the undersigned have this 5th day of August, 1878, located fifteen hundred feet in length [568] and six hundred feet in width of the above-named quartz lode mining claim, bearing gold, silver, copper and other metals, situated in the mining district, county and territory aforesaid, together with all the mineral veins contained within the following described metes and bounds, to wit: Beginning at the discovery shaft, thence running east 300 feet, thence west from discovery shaft 300 feet, thence northeast 750 feet, thence south of east 600 feet, thence southwest 1500 feet, thence north 600 feet, thence 750 feet in a northwesterly direction, to the place of beginning, comprising 1500 feet in a northern and southern direction and 300 feet in an east and western direction from the center of discovery shaft and including surface ground 300 feet in width on each side of the center of said lode, the corners of the said claim being marked by posts firmly set in the ground so that its boundaries can be readily traced. A copy of this notice was posted at the discovery shaft on said claim on the 5th day of August, 1878.

(Signed) JAMES HOUSE,
J. G. MARTIN,
JOHN U. McKAY,
Claimants.

Territory of Montana.

Missoula County.

The undersigned being first duly sworn on oath says, that he is of lawful age, a citizen of the United States and that the foregoing notice by him subscribed is a true copy of the original notice of location of the claim above described as posted at the discovery shaft thereon on the day therein stated.

(Signed) JAMES HOUSE.

Subscribed and sworn to before me this 12th day of August, 1878.

FRANK H. WOODY,
County Clerk. [569]

Filed and recorded on this 12th day of August, 1878, at 9 o'clock A. M.

FRANK H. WOODY,
County Recorder.

Territory of Montana,
County of Missoula,—ss.

I, Alvin Lent, County Clerk and Recorder of Missoula County, Montana Territory, do hereby certify the above and foregoing to be a full, true and correct copy of a mining location, together with all the indorsements thereon, as the same appears of record in my office.

WITNESS my hand and the seal of Missoula County, affixed this 9 day of June, 1888.

[Seal]

ALVIN LENT,
County Clerk and Recorder.

By Gust Moser,
Deputy. [570]

Friday, January 31, 1913.

[Testimony of C. E. Woodworth, for Defendant.]

C. E. WOODWORTH, a witness called and sworn on behalf of the defendant, was recalled and testified for the defendant, as follows:

Direct Examination.

In the last year or two I ran out the lines on section 14, township 11 north, range 16 west in the Hellgate and pointed out the lines to Mr. Welch, Mr. Fenwick, Mr. Harper and Mr. Burnett. The same gentlemen were with me when I ran out the lines from the southeast corner of section 2, township 11 north, range 16 west. I ran out the lines north between sections 1 and 2; also west from that corner between 11 and 2. I ran out the south line of section 6, township 11 north, range 15 west, commencing at the southeast corner and running west along the south line of the section. The same gentlemen were with me except Mr. McQuarrie instead of Mr. Welch. I also ran the south line of section 8, the same township and range. Mr. Harper, Mr. Fenwick and Dan McQuarrie were present when I ran that line. I also ran out the north line of section 26-11-15, and afterwards, but not when these gentlemen were present, I ran out the lines on section 26; also the lines on 22, and the other lines in the other sections that I have mentioned. I noticed coppering upon the stumps of section 26, all from the creek bottom to the edge on the cut on the west side. This coppering extended along the distance of one-quarter of a mile from the creek at the bottom and it reached an elevation of

(Testimony of C. E. Woodworth.)

probably 800 feet. There was another mill, the Dunbar and Johnson Mill, on section 23-11-15. It was located from a quarter to half a mile from this particular place where I found the coppering. That mill was in operation in 1900 or 1901. Where I pointed out these lines [571] I knew them to be the correct lines. I pointed them out correctly. As to the other mills that operated in the Hellgate Canyon, commencing at the west and working eastward on section 14-11-16, there was what was known as the Fenwick Mill, and Hammond and Baird had a mill there. On section 35, township 12 north, range 16 west, commencing next north of section 2, in township 11 north, range 16 west, Kendall Brothers had a mill there and Hadley Morrison. It was just north of the north line of section 2. It is in Cramer Gulch; on section 7-11-15, there was the Haycock Mill. On section 6 of the same township the McKean and McQuarrie Mill was located and the Morley Mill. On section 18, of that township James Tibideau and a man by the name of Tieriot had a mill. On section 8, same township, Harper and Baird had a mill; on section 16, same township, George Shoup had a mill; on section 21, same township, Harper and Baird had a mill, and on section 23, same township, Dunbar and Johnson had a mill. When I was pointing out the lines in the Blackfoot, there were others with me. Section 22, township 14 north, range 14 west, is where the Silvey claim is located. I pointed out the north and east lines of that section to Mr. Boyd and Mr. Henry Hammond,

(Testimony of C. E. Woodworth.)

and I pointed out what I knew to be the correct lines.

Cross-examination.

I think the Harper and Baird Mill, on section 14-11-16, was established in 1897. I don't know where they logged from, except that it was in that general vicinity of the mill. I think it was in 1896 that Kendall Brothers established a mill on 35-11-15. I should say the capacity of the Harper and Baird Mill and the Kendall Brothers Mill was 20,000 feet a day—each of them. I don't know when the Haycock Mill was [572] established on section 7-11-15. That was before my time. I saw the remnants of the mill there, but I don't know when it ran. From what I saw on the ground, from the sawdust there, I think the mill ran. I haven't any idea of the capacity of the mill or the character of lumber they sawed. I don't know from where they cut the timber. The McKean and McQuarrie Mill on section 6-11-15 was run in 1898. I don't know when it was established. They cut from the immediate vicinity of the mill, but from no other place when the mill was set there. This Thomas Tibideau Mill was on section 18-11-15. It was a small mill, established, I think, in 1907. The Harper and Baird Mill on section 8-11-15 ran in 1897 or 1898. The George Shoup mill was established sometime in 1890. As to the Harper and Baird Mill on section 21-11-15, they moved from one place to another within six or eight months. It was a small portable mill, with a capacity of, I should think, 20,000 feet a day. The Dunbar and Johnson mill on section 23-11-15, was established in 1900 or

(Testimony of C. E. Woodworth.)

1901. I do not remember whether on my examination of section 26-11-15 there were any stumps that were not coppered. I was not making an examination at that time to determine whether or not there were some stumps that were coppered and some that were not. I just casually noticed that some of the stumps were coppered. I could not tell whether if scaling had been made all of the stumps were counted or only a part of them. The characteristics as to age or condition of preservation of these stumps that were coppered—they all showed evidences of having been cut sometime; they showed evidence of age. The Dunbar and Johnson people cut in that Tyler Gulch; they did not cut on the flat—the timber had been cut there. In [573] Tyler Gulch, on section 23-11-15, the flat timber had been cut years before. Section 26-11-15 does not come down to the flat—it is all up in the gulch. When I pointed out the lines of the Silvey claim to Mr. Boyd and Mr. Henry Hammond, we went over the cutting and we went over the cutting on the east half of the northeast quarter of section 22-14-14. I don't know whether I went any east of section 22-14-14; if I did, it was only a short distance. I found the old cutting on section 22 and it extended over on to section 23 adjoining on the east. There was quite a swing around in there and it swung out east of said section 22. There might have been some of the stumps coppered on this east half of the northeast quarter of section 22, but I did not pay any attention to the coppering; I was not looking to see the extent of the cutting; I

(Testimony of C. E. Woodworth.)

know what was the extent of the area that had been cut over. The stumps were old stumps.

Redirect Examination.

I cannot tell the difference between a stump that has been cut nine years and a stump that has been cut eleven years. I could not tell the difference between a stump that has been cut nine years and a stump that has been cut fifteen years, unless there was something unusual about it.

[Deposition of Robert L. Harper, for Defendant.]

The deposition of ROBERT L. HARPER, a witness called and sworn on behalf of the defendant, was offered and read in evidence by the defendant, as follows:

I am the same gentleman who testified in this case as a witness called and sworn on behalf of the plaintiff on August 7, 1912. I recall testifying at that time, in substance, that I cut about three or four hundred thousand feet [574] of logs in what was known as Welch's Gulch, logged east of the Beaver Tail Hill and skidded those logs at the foot of said Welch's Gulch. I recollect testifying at said time, that I was testifying from my recollection of events in 1889, and that I had not been in the vicinity of where those logs were cut since the lines had been run by the Government survey. Since so testifying I have visited the gulch I called Welch's Gulch. On such visit, I determined where such Welch's Gulch was and where my cutting and skidding had been done in reference to the Government survey. I made

(Deposition of Robert L. Harper.)

this visit on the 29th or 30th of August, 1912—a week ago to-day. At that time I located the line running between sections 1 and 2, in township 11 north, range 16 west. In reference to sections 1 and 2, said township and range, I found the upper end of the so-called Welch's Gulch was located as to the upper end of it on section 1; the line crosses below where we camped—just below the camp before you go up the hill, then it runs up the hill toward the west, then it runs south and west and south. The mouth of said gulch in reference to said Government subdivision, is just a little west of the corner—the mouth of the gulch is southwest of the corner of section 2. I observed the territory that I have testified to on the 7th of August, 1912, as having been cut over by me, and I am now in a position to state that the cutting that I testified to as having been done on Welch's Gulch was done on section 1, excepting there might have been a few cut in section 36, in township 12 north, range 16 west. I would not swear positively that there was not some cut on the said section 36. I know where Marcellus Gulch is. I became familiar with that in 1898. I worked once in that gulch for Harper and Baird. I worked there in the fall of 1898 and until March, 1899. [575] At the time I worked there, I do not think the government lines were surveyed out on the ground. Since I worked in Marcellus Gulch I went up there the other day and they showed me where some lines were in section 8, township 11 north, range 15 west. The line that was shown me at that time was the south line of

(Deposition of Robert L. Harper.)

said section 8, running east and west.

Q. Who pointed that out?

A. There was Mr. Woodworth there and Mr. Wills, the man who owns the land.

(Witness Continuing:) In view of my present knowledge of where the south line of section 8 is and its relation to Marcellus Gulch, I now testify that when the timber was cut when I was working there in the fall of 1898 and the spring of 1899, they cut over as far down as there was any timber. They came down as far as they had any timber, about a quarter of a mile below they had the timber; then they worked up about two miles above the mill that winter, and up the gulch and ridge that came into that gulch. By them, I mean Harper and Baird. The mill I have testified to was located half a mile up the gulch above the said south line of section 8. As to the number of thousand feet of logs that I hauled in this gulch—they probably cut in my time of being there two million or two million and a half feet. There was a gradual slope down from the mill to the east line of section 8. We hauled some logs up this gulch. I wouldn't say positively how much was hauled up to the mill, but I should judge about two or three hundred thousand, maybe a little more, I would not say positively. We hauled there a couple of weeks and used two or three teams. There was no difficulty in hauling these logs up the gulch, to the mill, if only small loads were hauled. The time I commenced [576] logging operations in this gulch there was no evidence of old logging

(Deposition of Robert L. Harper.)

roads as far as the mill. I testified that I commenced our logging in that section about a quarter of a mile from the line at the south side of the section. I found possibly a few trees cut south of the point where I commenced my operations. We were as far as there was any timber grew down the gulch. I could not state how far these logging operations of Harper and Baird extended beyond the gulch. Possibly we went over on the east side of the gulch—we went over that in to another gulch. I don't know how far they went, probably a mile and a half. From the setting where that mill was, I think our operations ran up about a mile and a half; after I left there they moved; I don't know anything about their cutting. On the west side of the gulch, we cut the slope that came towards the mill, probably a quarter or half a mile. I don't know just—what-ever sloped in towards the mill.

Cross-examination.

I came to make this trip out over the land again because George W. Fenwick sent for me. Mr. Fenwick is the man who operated the sawmill at the time I was there when I was logging out of Welch's Gulch. That is not the Welch Gulch on section 14, in township 11 north, range 16 west—that is another gulch. The Welch Gulch I now refer to is the first gulch of any importance east of Cramer Gulch. I did not know at the time I cut out of Welch's Gulch that it was located on sections 1 and 2, in township 11 north, range 16 west. I didn't know anything about the section lines then. I didn't cut any out of

(Deposition of Robert L. Harper.)

the Cramer Gulch. When I went to cut out of Welch's Gulch, no one directed me where to cut. I had a roving commission from Fenwick to cut anywhere I wanted to—that is [577] how I happened to be cutting there. Fenwick told me to cut anywhere I wanted to up in that country. There was no particular section or quarter section designated by anyone that I should cut from. There was no public survey in there at that time, as I know of. I didn't know any section line, nor section corners. We cut just about a mile north from the mouth of the gulch. There had been some cutting, a little done in there before I was in there. Practically all of that Welch Gulch lies in what I now know to be sections 1 and 2, in township 11 north, range 16 west. The west slope of the gulch lies over the line on section 2 until you get about half a mile up, then it runs up on top of the hill and into section 1.

Q. Did you do any cutting on this part that goes over on to section 2?

A. We cut on the right-hand side of the gulch—practically all we cut.

(Witness Continuing:) I don't know who cut on the left-hand side; we cut on the further back end of that cutting. There was already some old cutting there in Welch's Gulch when I went there. I don't know who cut there. From the appearance of the stumps this old cutting had been done on the left-hand side of the gulch probably two or three years before my cutting. I do not know where these logs went to that had been cut from there—that was my

(Deposition of Robert L. Harper.)

first work in the country. I just came. My cutting was done up the hill from the mill—the logs went to the river. Having looked over these section lines, I want to swear positively that I did not cut any on section 2 out of Welch's Gulch. I can tell at this late date as to whether or not I cut on section 1 or 2, inasmuch as it must have been a half or three-quarters of a mile from the mouth of the gulch to where I cut any logs and by the time you get up that far, the line runs up on top [578] of the hill. I only cut on the right-hand side as you go up the gulch—probably only cut over towards the Strong Gulch. The Strong Gulch lies to the right-hand as you go up the gulch; that would be to the east. I think I cut in the neighborhood of about three or four hundred thousand feet out of this gulch on section 1. I say that the cutting that was done on this gulch on the left-hand side as you go up, which would be on section 2, was done some two or three years prior to the time I cut on the right-hand side. The older cutting was done before I went there. I went clear to the back end.

Q. The older cutting was on section 2?

A. There was a lot cut on section 1, too.

Q. The great body of it had been cut on section 1?

A. Might have been some of it, yes.

Q. Was there, or was there not?

A. I could not say.

(Witness Continuing:) I expect there might have been a few trees cut on section 2—after you get up the hill until it went over the top; I expect in the

(Deposition of Robert L. Harper.)

neighborhood of sixty acres on the west side of that gulch was included in section 2. Part of that sixty acres there never was any timber on. I could not say positively how much there was timber on, there would be twenty acres; at the upper end there was timber on twenty or thirty acres and that twenty or thirty acres was cut when I got there, and I say this timber had probably been cut two or three years before I cut there. I do not know of any sawmill in that vicinity other than the Bonita Mill to which this twenty or thirty acres might have been logged during that time. There was no other mill there that I know of. [579]

Q. You know, do you not, that there was no other mill in that vicinity to which these logs that had been cut off of section 2 might have been logged, do you not? A. No, I do not.

(Witness Continuing:) I was in that vicinity first in 1888 and 1889 logging—the fall of 1888 and the spring of 1889 and I do not believe I ever saw any evidence of any other mill around there. When I went out over the Marcellus Gulch the other day with Mr. Fenwick and Mr. Woodworth, I didn't examine all the lines or corner-stones. I just went up to the fence and Mr. Wills told me that was the line. I learned from somebody the other day that that was the definite south line of section 8—11—15. It crosses the gulch in back of the Hauswirth house. I am not positive that that is the south line of section 8. Mr. Wills told me it was, I was not at the corners on that. I don't know that of my own knowledge from any

(Deposition of Robert L. Harper.)

independent examination made by myself whether that is the line. It was the spring of '98 and '99 that I cut out of Marcellus Gulch for Harper and Baird. I was not a member of that firm. My brother was the Harper and Tom Baird was the Baird. I was working for them by the month. I think I got \$50.00 a month wages. The timber that was then logged by me out of the Marcellus Gulch was sawed by Harper and Baird. They sold it to J. T. Carroll of Butte. They came to cut out of Marcellus Gulch for they had a contract in Butte with Mr. Carroll and they just went there and got the lumber. At that time lumber was very cheap and they were following the fir; they could get a little more for it. All I cut out of Marcellus Gulch was not cut off section 8. I could not give you any idea of the amount [580] cut off section 9; I think they cut all they could get that sloped towards the gulch. Mr. Wills told us that the center of section 8 was right by the millsite. He was with us and he owned some of that land. There had been no other cuttings before my time in Marcellus Gulch that I noticed. I don't think there was; there was no road up there, they had to make a road to get the mill in. As to the completeness with which I cut out that Marcellus Gulch, they cut all they could get that came in the slopes of the gulch; they went out of the gulch in several places where it was low draws and they could get over. I could not say what right I had to cut there. Nobody directed me to cut. I got my authority and directions from Harper and Baird.

(Deposition of Robert L. Harper.)

I could not tell you the value of the timber that was cut out of Marcellus Gulch, but I think they were getting about \$7.00 a thousand at that time on board the cars at a place they called Baird's Spur at that time, which is five miles east of Bonita. Mr. Woodworth showed me where the section lines were between sections 1 and 2-11-16. We went to the corner, drove right up to it with the automobile. I examined the corner myself. I traced out the line north up the hill. Mr. Fenwick was in charge of the Bonita Mill when I cut off section 1-11-16. I don't know what his relation to the mill was. I received all my orders and instructions from Mr. Fenwick. We commenced logging there in 1888. I do not know how long Mr. Fenwick had owned that mill when I commenced to work for him. I was paid for logging off section 1 by Fenwick giving me an order to the Missoula Mercantile Company—a check we called it at that time—and it was paid through the Missoula Mercantile Company. I could get no pay—no money—up at the works; you could get goods or anything of that kind. Mr. Fenwick was right on the ground [581] and in immediate charge of the mill at that time. Mr. Graham was there—he ran the woods at that time for Mr. Fenwick, the way I understood it. I was a stranger in the country myself at that time; the first work I did in Montana was in 1888.

Redirect Examination.

Mr. Woodworth was also on section 8-11-15 at that time. He also pointed out to me the location of

(Deposition of Robert L. Harper.)

the different lines on it to which I have testified.

Recross-examination.

I could not say positively of my own independent knowledge of any particular point I was shown on section 8, but Mr. Wills, the owner of the land, that was with us, said it was section 8. That is all I know about it.

[Testimony of A. B. Hammond, on His Own Behalf.]

A. B. HAMMOND, a witness called and sworn on behalf of himself, testified as follows:

Direct Examination.

I reside in San Francisco; I am the defendant in this case; I am sixty-four years old; I have lived in San Francisco since 1900; I have lived in the State of California a portion of the time in 1888, 1889, 1890 and 1891. I first went to the State of Montana in 1867, and to the town of Missoula in 1868—but I went there to live in 1872. My first occupation when I went to the town of Missoula to live was employment by E. L. Bonner & Company. There was a firm known as E. L. Bonner & Company at that time in Missoula; that was not the same firm of E. L. Bonner & Company that afterwards had transactions with the Northern Pacific Railroad Company. In 1872 Missoula had about four hundred inhabitants. [582] In 1876 I became a member of a firm known as Eddy-Hammond & Company. That was a partnership composed of E. L. Bonner, R. A. Eddy and myself. That firm continued in business under that name until August, 1885. There was no other per-

(Testimony of A. B. Hammond.)

son interested in the firm of Eddy-Hammond & Company at any time from its inception to August, 1885, than those whom I have mentioned. During all of those years the firm was engaged in a general merchandise business. We dealt largely in horses and cattle. As a firm we bought and sold horses at that time. We hauled our goods and merchandise from a town near Ogden on the Union Pacific into Missoula. Concerning a barn or stable that has been mentioned in the testimony, that barn was built in the early '80's, perhaps a little later. The relationship this firm of Eddy-Hammond & Company bore to the former firm of E. L. Bonner & Company was this: Mr. Bonner and Mr. Eddy composed the firm of E. L. Bonner & Company. They were members of the copartnership of Eddy-Hammond & Company. When the firm of Eddy-Hammond & Company was formed, it took over the assets of the former firm of E. L. Bonner & Company. The copartners forming the firm of E. L. Bonner & Company in Deer Lodge were E. L. Bonner and J. H. Robertson, and at Butte the copartnership was E. L. Bonner, J. H. Robertson and M. J. Connell; the gentleman last mentioned is the present Fish and Game Commissioner of California. In Missoula the firm of E. L. Bonner & Company was R. A. Eddy and E. L. Bonner. I was not interested at any time in either of the houses that I have mentioned, other than at Missoula. My only interest was in Missoula. I had clerked for E. L. Bonner & Company four years before I became interested. The business of

(Testimony of A. B. Hammond.)

Eddy-Hammond & Company was done almost entirely on credit. The course of [583] business transacted by the firm of Eddy-Hammond & Company during its existence in the matter of extending credit was as follows: At the commencement of their business, and in fact, during the existence of the co-partnership, their business was largely with the farmers, with the miners and with the fur traders. We had a large Indian trade, which extended as far north as the British line; we also had some dealings with the small sawmills and flour-mills that were in the country at that time. As I say, the business was largely done on credit, and when we supplied customers with goods, we generally had to finance them and take care of them until such time as they could sell their crops or their furs or until the stock raiser could sell his cattle. We advanced them provisions or we advanced them money. We advanced them money to pay their taxes and paid their men. At that time there were farmers in the vicinity who were our customers; it was quite an agricultural country. We had quite a large farming trade in the Bitter Root Valley and in the matter of the payment of men, this method extended to the farmers as well as our other customers. The method by which credit was extended, with reference to the form of the paying out of goods or money, was as follows: We credited, for instance, different farmers; if one farmer was indebted to another and didn't have the money to pay him, he would frequently give an order on Eddy-Hammond & Company to have his account

(Testimony of A. B. Hammond.)

charged up to the party's account who gave the order. That was so general in that section of the country that transactions of that kind came to be known as Bitter Root turns. In a sense, one man advanced money to pay another man's debts. He sometimes collected a bill from the farmer, but did not get any money; it was charged up to another farmer, to another customer. There were sawmills in this country in the State of Montana in that [584] vicinity prior to the inception of the Northern Pacific Railway; we had dealings with sawmills at that time. We advanced them goods and we dealt with the sawmills the same as we dealt with the farmers and stockmen. In reference to the payment of their men, they gave orders on our firm for the payment of their men, which we accepted and paid and charged up to them. At no time was the firm of Eddy-Hammond & Company a dealer in lumber. It did not buy or sell lumber at all. The firm of Eddy-Hammond & Company sold out its business to the Missoula Mercantile Company in August, 1885. After its organization, the Missoula Mercantile Company carried on business along the same lines that Eddy-Hammond & Company had carried it on; it extended credit to the farmers, stockmen, sawmill men, contractors and builders of the railroad, traders and miners; it continued to do the same class of business. In the matter of extending credit, both for money paid out and for goods, wares and merchandise purchased—we accepted orders from the customers. In fact, it was necessary in that country,

(Testimony of A. B. Hammond.)

at that time, when you undertook to carry a customer that you had to furnish him money to pay his men and to do his business until such time as he could raise his crop or sell his product and pay his bills. There was no difference in the method of extending credit practiced by the Missoula Mercantile Company from that practiced by its predecessor, Eddy-Hammond & Company. The Missoula Mercantile Company never dealt in lumber; it never owned any sawmills, nor did it ever own any stock in any corporation interested in sawmills. I have testified as to a second firm of E. L. Bonner & Company different from the first that at Missoula was merged into the Eddy-Hammond & Company. The second firm of E. L. Bonner & Company was a [585] copartnership that was entered into in 1881 for the purpose of contracting with the Northern Pacific to furnish it with ties, piles and lumber and clearing the right of way for about two hundred and eighty miles of the road on the main line of the Northern Pacific. E. L. Bonner, J. H. Robertson, R. A. Eddy and myself were the members of that firm.

Q. I hand you a certified copy of a document issued by the Department of the Interior (hands witness document), and I ask you whether or not that is a document having any relation to the copartnership of E. L. Bonner & Company, the firm just designated by you? A. Yes.

The COURT.—You are asking the witness now about the second firm of E. L. Bonner & Company.

(Testimony of A. B. Hammond.)

Mr. WHEELER.—The one that did the railroad work.

(Witness Continuing:) That was organized before the Missoula Mercantile Company, which was organized in 1885, after the railroad was built.

Defendant thereupon offered in evidence the said document, constituting the appointment of this firm of E. L. Bonner & Company as agent for the Northern Pacific in the selection of timber and cutting there, which said document was marked Defendant's Exhibit "Q," and is in the words and figures following, to wit: [586]

[Defendant's Exhibit "Q"—Appointment of E. L. Bonner & Co. as Agent of Northern Pacific, etc.]

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

Washington, D. C., September 29, 1887.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed copy of appointment of E. L. Bonner, J. H. Robertson, A. B. Hammond and R. A. Eddy as agents of the Northern Pacific Railroad Company, to procure timber from the public lands for construction purposes, dated New York, Sept. 23, 1881, is a true and literal exemplification of said paper on file in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the seal of this office to be affixed at the City of Washington, on the day

and year above written.

[Seal]

WM. A. J. SPARKS,

Commissioner of General Land Office.

E. L. Bonner, J. H. Robertson, A. B. Hammond and
R. A. Eddy:

You are hereby appointed agents of this Company for the purpose of procuring and taking from the public lands adjacent to the line of the Northern Pacific Railroad, timber necessary for, and to be used in, the construction of said railroad in the western part of Montana Territory, under the direction of the engineer in charge of the work of construction and as required by him for such construction.

The right, power and authority of the Company to take from the public lands, material for the construction of its railroad, are granted by the charter of the Company (Act of Congress of July 2nd, 1864); nevertheless the circular of the Commissioners of the General Land Office, dated July 15, 1881, specifying the right of railroad companies, under the act of [587] March 3rd, 1875, except clauses numbered 6 and 7 thereof, will be regarded by this Company as applicable to the exercise of the like right granted to it by the charter. A copy of the circular referred to is herewith enclosed; and you are required to comply strictly with its provisions, except those contained in the clauses numbered 6 and 7, as above mentioned.

Your appointment is subject to revocation, at any time, and without notice.

You will acknowledge the receipt of this letter and

the enclosed "circular" to the engineer in charge of the work.

Yours,

T. F. OAKES,

Vice-president.

New York, September 23, 1881.

CIRCULAR.

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

Washington, D. C., July 15, 1881.

To Registers and Receivers United States Land Office and to Special Agents of the General Land Office:

Gentlemen: The first section of the Act of Congress approved March 3rd, 1875, 18 Stats., 482, granting to railroads the right of way through the public lands of the United States, provides that any railroad company organized as therein described, shall have "the right to take from the public lands adjacent to the line of said railroad, material, earth, stone, and timber necessary for the construction of said railroad." [588]

In determining the rights of the railroad companies under the foregoing provision, you will be governed by the following instructions:

1. Said provision refers exclusively to contemplated or unconstructed roads. Companies have no right to take timber or other material, under this act, for repairs or other future improvements of roads already constructed.

2. The right granted to any railroad company un-

der this act, to take material from the public lands "adjacent to the line of said railroad," is not restricted to lands within any definite distance from the line of the road, to the nearest or most convenient points opposite the line of the road and within the terminal points of the road.

3. It is not necessary that the required material be taken at right angles with or opposite to the exact points at which the work of construction is being done, but said material may be taken from such points as are nearest or most accessible to some part of the road, measuring from the line of the road. The same rule that would apply to the removal of earth for use in the construction of a road is equally applicable to the procurement for the same purpose of the necessary stone or timber. Stone or timber may therefore be taken from the public lands opposite the line of the road within the termini thereof, and carried forward and distributed as required in the progress of construction.

4. The right under this act to take material from the public lands for the construction of railroads is granted to railroad companies organized according to the provisions of this act, and to no other parties. Railroad companies have no power to give general authority to the public to cut timber [589] from the public lands, nor has Congress ever given such authority to the public.

Individuals controlled and directed by a railroad company, or by the contractors of such company, for building its roads and for whose act the company is and can be held responsible, will be deemed the

agents of the company within the meaning of this act.

But individuals cutting timber from the public lands and selling the same to a railroad company at an agreed price are not agents of the company. In such a case the railroad company would have no authority to direct the place where, or the manner in which, the timber should be taken, nor any control whatever over the individuals cutting the timber, nor could it be held in any way responsible for the conduct of such individuals.

Only those persons, therefore, who are the direct, duly authorized agents of a proper railroad company can represent the company in the exercise of the rights granted to such company under this act. Persons who merely contract to cut and deliver to a railroad company ties or other timber at certain rates per tie or quantity, and for whose acts the company is not responsible, have no authority to take the timber from the public lands even for delivery to a railroad company authorized to take such timber by its proper agents. Such unauthorized persons will be deemed trespassers on the public lands and must be proceeded against accordingly.

5. Each right of way railroad company must arrange for procuring the material authorized to be taken in such manner that it may be held responsible for any unlawful taking of materials or waste of public property. [590]

6. In all instances wherein a railroad company desires to take large quantities of earth, stone, or timber, under the provisions of this act, from any

(Testimony of A. B. Hammond.)

one particular spot or vicinity, the proper officer or duly authorized representative of said company must make application in writing to the Commissioner of the General Land Office, through the Register and Receiver of the proper land district, specifying, under oath, the kind of material required; the purpose for which it is desired; the probable amount or quantity needed and designating the public lands from which the material is to be taken, describing the lands, if surveyed, by section, township and range, or if unsurveyed, indicating their localities by reference to some well known point.

7. The Register and Receiver will transmit such application to this office in special letter, with their report thereon, for appropriate action.

8. The lands from which material is authorized to be taken under the act, are the vacant, unoccupied public lands of the United States, not reserved or otherwise appropriated.

N. C. McFARLAND.

Commissioner.

Approved July 19, 1881.

S. J. KIRKWOOD.

Secretary. [591]

(Witness Continuing:) This appointment was never revoked. The J. H. Robertson named in said document, Defendant's Exhibit "Q," is the J. H. Robertson that I have testified to, was a partner in the new firm of E. L. Bonner & Company, and Mr. Eddy and Mr. Bonner are the same Mr. Eddy and Mr. Bonner who were partners in Eddy-Hammond

(Testimony of A. B. Hammond.)

& Company. Mr. Robertson never had any interest at any time in the firm of Eddy-Hammond & Company. The Northern Pacific was under construction in this particular country in 1881 and late in 1883 the road was joined together, but was not completed until along in 1885. By "not completed" I mean the bridges were temporary. The construction was joined together and they ran trains over it in 1883. The Northern Pacific at that time was apprehensive of losing its land grant and it had to push through and get the road completed, and they did the work as fast as they could, in order to hold the grant. It was what might be called temporarily complete in 1883 and more permanently complete in 1885. Concerning the construction of temporary bridges by the Northern Pacific Railroad—the railroad engineers knew but little about that section of the country through which the road was being built. For instance, when they came to a gulch where there was a large watershed, they did not know what the volume of water would be that would collect and run down there when the snow melted in the spring; and instead of filling it up with earth, they went across the low places with piles, intending later on, as the situation developed to fill them in with work trains when they could tell how large an opening they would have to leave to let the water run into the river. After the firm of E. L. Bonner & Company undertook this contract, [592] the first timber located adjacent to the right of way coming from the east that was of any conse-

(Testimony of A. B. Hammond.)

quence, was at McCarty's Bridge, about eight or ten miles, probably eight miles, east of Bonita. Tyler's Gulch is near by to McCarty's Bridge, and that is where the first timber is encountered coming from the east. Going west, the road ran out of the timber at Bonner. In this particular section, the firm of E. L. Bonner & Company, under contract, supplied, for the use of the Northern Pacific Railroad Company in construction along the line, under one order, 5,000 piles. We had additional orders afterwards, and I would say that we have gotten out at least twenty thousand piles in that section. These piles that we got were taken adjacent—as near the line of the road as we could get them, where we could get them the cheapest. They were all taken along the line of the Hellgate between the town of Bonner and Tyler's Gulch. A great many were taken around Bonita. At Wallace, west of Bonita, there was a sawmill, and at Turah there was a sawmill. At other places they wanted lumber for bridge timbers and consequently they contracted for piling where we had no mills—where we were not operating any mills. We took piling along the Hellgate River from the flats between what was afterwards the Bonita Mill and Tyler Gulch. We took it from the flats first. Wherever the flat country was timbered, we took piling because it was nearest to the line of the railroad, and as a rule, the railroad followed the bottom. This piling was peeled in some cases and in other cases it was not peeled. As to whether or not where a mere stump was left after the taking

(Testimony of A. B. Hammond.)

of the piling, the appearance of the stump was any different from that of the appearance of a stump that had been cut for a sawlog—our [593] pile specifications were for not less than 10 inches at the tip and not more than 20 inches at the butt. Our piles were gotten out from thirty to sixty feet long and in some instances longer. Now, a tree of that kind would make a good many sawlogs if sawed up. The stump would not look any different from a tree cut for a sawlog. I knew of a mill called the Haycock Mill. I know that in the vicinity of that mill, up and down the Hellgate River, logs were sawed for bridge timbers at that mill and utilized in the construction of the railroad. I know of my own knowledge that piling was taken from the lands along the Hellgate, both east and west of Bonita Station and moved to points east and west beyond the right of way which we had the contract to clear. Our contract was that we were to furnish the lumber and piles and ties anywhere along the right of way, wherever it could be delivered most conveniently. I was at a place called Wallace. In the first instance a man by the name of Katchin owned mills there. At the Katchin Mills lumber was sawed and was used as bridge timbers by the Northern Pacific Railroad in the construction of the road—that was the principal place of supply. Practically all of the roundhouse, depot and section-house timbers were furnished from that particular mill. I recall a corporation called the Montana Improvement Company. It was incorporated in 1882. The railroad

(Testimony of A. B. Hammond.)

business of E. L. Bonner & Company was taken over by the Montana Improvement Company. The principal office of the Montana Improvement Company was at Deer Lodge. E. L. Bonner was the president of that corporation. As to the stockholders of that corporation—the Northern Pacific owned fifty-one per cent; a man by the name of George Conklin—\$250,000—he had twenty-five hundred [594] shares. My proportionate interest in the Montana Improvement Company was about one-fifteenth of that corporation. That corporation acquired the Wallace Mills; it also acquired the mill known as the Thompson or Allen Mill, which was subsequently set up at Bonita. The persons I have named as stockholders of the Montana Improvement Company remained stockholders during the existence of the corporation after the Northern Pacific acquired its interest in the corporation—there were slight changes, if any. During all the time that I was a stockholder of the corporation, the interest of the Northern Pacific Company therein did not change. The Montana Improvement Company owned lumber yards. They had a yard at Butte, a yard at Helena and a yard at Deer Lodgs. That corporation commenced the construction of a dam on the Blackfoot River in the winter of 1884. The dam was not completed; it went out in the flood of 1885—in the spring. The remnant of the Company's dam on the Blackfoot was sold to W. H. Hammond. This Thompson Mill that I have spoken of was sold to Fred A. Hammond. The Montana Improvement

(Testimony of A. B. Hammond.)

Company erected that mill at Bonita. It sold the *the* mill to Fred Hammond and agreed to erect it at Bonita and set it up for him—sold it and set it up for so much. Mr. E. L. Bonner at the time of the incorporation of the Montana Improvement Company resided at Deer Lodge—the headquarters of this corporation. He continued to reside there for a number of years, but during the building of the Northern Pacific Railroad he spent a great deal of his time in Missoula, and shortly after its completion he decided to move to Missoula and did build a house and move there. Mr. E. L. Bonner was at all times president of the Montana Improvement Company. When Mr. Bonner moved from Deer Lodge to Missoula, the principal [595] place of business or office of the Montana Improvement Company was moved to Missoula. The office was moved to Missoula in the fall of 1885. The Montana Improvement Company operated the Wallace Mill. It operated that mill from the fall of '84 until some time in 1885. I don't think it cut sawlogs after the summer of '85. It did no cutting after that time. The Montana Improvement Company had a shingle mill at Noxon, which place is probably one hundred miles west of Missoula. The product of the shingle mill—the shingles—were used for the section-houses and roundhouses. It was a small mill that cut cedar shingles. The Montana Improvement Company never operated the mill at Bonita. It never operated any mill up the Blackfoot. The Montana Improvement Company went into active business in

(Testimony of A. B. Hammond.)

1884 and went out of active business in 1885. While it was incorporated in 1882, it did not start active business until after the railroad was completed. It ceased operations in 1885 and in July, I think it was, 1885, there was a meeting of the directors at Deer Lodge and they decided to go out of business. When the Montana Improvement Company ceased active business, in reference to its properties and plants, it decided to go out of business and sold them. Decided to sell the property and liquidate the business. One of the mills at Wallace was sold and moved away. The other continued to operate there until, I think, a few months later, perhaps in the spring of 1886, was disposed of or moved away. The shingle mill was burned down. The different lumber yards that I have mentioned were sold. The Helena Lumber Yard was sold to B. H. Coombs. After Coombs purchased the Helena lumber yard, he ran it a while under his name and then incorporated it under the name of the Helena Lumber Company. I never had [596] any shares of stock in the Helena Lumber Company, nor had I any interest with Mr. Coombs in the Helena Lumber Company. The lumber yard was sold to Coombs in 1885. I could not say when the Helena Lumber Yard was incorporated, but perhaps it was a year or two after it was sold to Coombs. The Montana Improvement Company had absolutely no interest in any of the lumber yards which it had owned prior to the sale that I have spoken of or in any one of the mills that I have mentioned in my testimony after their sale

(Testimony of A. B. Hammond.)

or other disposition that I have testified to. They decided to go out of business and liquidate. The Missoula Mercantile company did not acquire, either directly or indirectly, any interest at any time in the Bonita Mill, the mill constructed on section 14—in the Hellgate; nor did it any time, either directly or indirectly, acquire any interest in the Blackfoot Mill or property or dam, or any of that property on the Blackfoot, which I have testified the Montana Improvement Company sold to Henry Hammond. Mr. Bonner and Mr. Eddy conducted the negotiations for the sale of that property on the Blackfoot to Henry Hammond. I did not participate in any of these negotiations. I declined to participate. I did not participate in the negotiations that led to the sale of the mill at Bonita to Fred Hammond. The same parties—Mr. Bonner and Mr. Eddy conducted those negotiations. I knew that they were negotiating with Fred A. Hammond, but I declined to participate in the negotiations. I heard or learned of the sale of the Bonita Mill by Fred A. Hammond to George W. Fenwick. I did not participate in the negotiations that led to the sale by Fred A. Hammond to George W. Fenwick of the Bonita Mill. I have a very slight recollection on the subject that has been testified to to the effect that Mr. Hathaway [597] went out and made an inventory of the matter of that transfer or concerning Mr. Hathaway's testimony that he believed I sent him there. My recollection is that Fred A. Hammond and Mr. Fenwick had negotiated and they came to an under-

(Testimony of A. B. Hammond.)

standing by which the mill would be sold by Fred Hammond to Mr. Fenwick, and that they had agreed on Mr. Hathaway to take the inventory for them and assist them. I have no recollection of sending Hathaway there or telling him to go there or anything of that kind. If he had requested me to do so, I might have—whether I so did or did not, I do not recollect. I did not have, either directly or indirectly, any interest in the Bonner Mill at the time that same was acquired by Henry Hammond. I did not have any interest, either directly or indirectly, at the time that the Bonita Mill was acquired by Fred Hammond, any more than the interest—the interest I represented in the Montana Improvement Company and the interest I had in the sale of the mill to Fred A. Hammond. Beyond that, I did not acquire any interest of any kind by reason of that transaction. When Fred A. Hammond sold to George W. Fenwick, I did not, either directly or indirectly, acquire any interest in the mill, business, or property that G. W. Fenwick thus acquired. I did not ever individually at any time own any interest in either the Blackfoot property or in the Bonita property with Henry Hammond or Fred A. Hammond or George W. Fenwick. I did not ever share in or participate in the profits of either the Blackfoot or the Hellgate property while the same were being operated by Fred A. Hammond, George W. Fenwick or Henry Hammond, prior to the organization of the Blackfoot Milling and Manufacturing Company. I did not at any time ever par-

(Testimony of A. B. Hammond.)

ticipate in any of the profits of the Bonita Mill or property while the [598] same was being operated by George W. Fenwick or Fred A. Hammond, or at any other time.

The Missoula Mercantile Company was never at any time interested in either of those companies or in the profits derived from the conduct of the business there. The Blackfoot Milling and Manufacturing Company was never at any time interested in the business of the Bonita Mill, either while owned by Fred A. Hammond or George W. Fenwick, or at any other time. The Big Blackfoot Milling Company was never at any time interested in the property or profits of said mill under said management, or at any other time. As to my occupation and place of business from the year 1885 to and including the year 1895—in 1885 and 1886 I became associated with some gentlemen in a syndicate having for its object the building of railroads, that would act as branch lines or feeders to the Northern Pacific. We built the Bitter Root Railroad, running from Missoula to Grantsdale, about fifty miles. We built from Phillipsburg to Drummond a railroad running from Drummond to Phillipsburg. We built a road from Helena to Remini and to Marysville; we also built a road from Laurel to Rocky Ford, in Montana. I had a four-ninths interest in the contract that built the railroad from Laurel to Butte, a distance of seventy-one miles. I stated that we built a road from Laurel to Rocky Ford. We built a road into the Rocky Ford country. I forget the name of the

(Testimony of A. B. Hammond.)

place we started from, but it was not Laurel. This was all between 1885 and the summer of 1889. In 1894, I went to Oregon and bought the Oregon Pacific—reconstructed it. I was in Oregon from 1894 until I came to California to reside permanently. In 1894 I commenced building the Astoria and Columbia River Railroad. As to my principal absences from the State of Montana during the period of [599] 1885 to 1896—I was in California during the winter of 1888, 1889, also 1890 and in the summer of 1891. Sometime in the summer I moved to Oakland, and lived on Jackson Street, until 1892. I was in Europe for seven months in 1892. My absences in California in the winters I have mentioned comprised about three months in 1888 and a longer period in 1889 and 1890. While I was in Montana engaged in railroad construction, I lived in Missoula until 1888. The headquarters of our railroad operations were in Helena; during the years that I named, my business took me to Helena frequently. I had a real estate business in Helena, put up some buildings, but Helena was the headquarters of these syndicates that I have spoken of that built these railroads. In reference to the construction of these railroads in Montana and the time I spent away from Missoula in connection with them, I think probably a half or a third of the time I was absent from Missoula. Concerning the Blackfoot operations, I remember the organizing of the Blackfoot Milling and Manufacturing Company. I remember a transaction that it had with Henry Hammond with regard

(Testimony of A. B. Hammond.)

to property on the Blackfoot, I was a stockholder practically from the inception of the Blackfoot Milling and Manufacturing Company. It itself never operated any mill upon the Blackfoot River. It acquired the plant at Bonner that had previously been operated by Henry Hammond. It was incorporated for that purpose, and acquired that property practically immediately on its organization. After it acquired the property, it never operated on the Blackfoot itself. The corporation had other milling business than the business on the Blackfoot. It had three or four small portable mills along the line of the Bitter Root Railroad that were put in at the time of the construction of the road for the purpose of sawing lumber and to build the same. The Blackfoot Milling and Manufacturing Company [600] operated these mills in the Bitter Root for a period of time between the time of its incorporation and the sale of the Blackfoot property to the Big Blackfoot Milling Company. The Bitter Root Railroad was completed in 1888, and sometime after that and after the Blackfoot Milling and Manufacturing Company was organized, these little mills were sold by the syndicate that built the Bitter Root Railroad to the Blackfoot Milling and Manufacturing Company. That company operated them until such time as they cut out the settings. By a setting, I mean a small amount of timber. Timber grew upon the lands that had been taken up by the settlers and patented in the Bitter Root Valley. They were small settings. By a setting I mean a small quantity of timber—per-

(Testimony of A. B. Hammond.)

haps a million or a million and a half feet. It is the immediate vicinity around the present locality of one of those portable mills. After these small portable mills came into the ownership of the Blackfoot Milling and Manufacturing Company, it sold the lumber wherever they found a market. Some of it went to the Helena lumber yard. I think my ownership of stock in the Blackfoot Milling and Manufacturing Company was about twenty per cent. I never owned, either directly or indirectly, any other stock at any time in the Blackfoot Milling and Manufacturing Company than such stock as was in my name, which I actually owned. That is represented by this twenty per cent, or thereabouts, to which I have referred. When the Blackfoot Milling and Manufacturing Company was operating these mills in the Bitter Root, the mill property owned by the same corporation in the Blackfoot that was leased to W. H. Hammond, was operated by him and while that mill was so operated by W. H. Hammond, I did not, either directly or indirectly, participate in the [601] profits of its operation, nor did any of the corporations in which I was a stockholder, either directly or indirectly, participate in the profits of that operation. I remember the organizing of the Big Blackfoot Milling Company. It succeeded to the property owned by the Blackfoot Milling and Manufacturing Company. The Blackfoot Mill property was never run by the Blackfoot Milling and Manufacturing Company. After the Big Blackfoot Milling Company was incorporated, it took over

(Testimony of A. B. Hammond.)

the property of the Blackfoot Milling and Manufacturing Company, and they then proceeded to operate on the Blackfoot. I think that was in 1891. During the period of time ending with the year 1895, the greatest extent of my holdings of stock in the Big Blackfoot Milling Company was about the same as the stock that I held in the Blackfoot Milling and Manufacturing Company, that is to say, about twenty per cent. I don't think I increased my holdings of stock in the Big Blackfoot Milling Company beyond that twenty per cent, or thereabouts, during the period of time ending with the year 1895. I may have increased my holdings. Those things happened a long time ago. I have no recollection of increasing my holdings. I did not buy any large block of stock at that time, in those years. Twenty per cent was approximately what I owned, directly or indirectly, during those years. The names of the stockholders, as nearly as I can recollect them, in the Big Blackfoot Milling Company, during the period of its existence and ending with the final disposition of the stock, here testified to, to the Anaconda people, as they are called in this record, in addition to myself, were E. L. Bonner, R. A. Eddy, W. H. Hammond, C. H. McLeod, J. M. Keith, Thomas C. Marshall, T. G. Hathaway, Sr., and T. G. Hathaway, Jr. I do not think there was any great change [602] in the stockholders between 1895 and 1898. G. W. Fenwick, Mrs. Fenwick, and George L. Hammond were also stockholders. I think I have named from memory about all the stockholders there were. I think

(Testimony of A. B. Hammond.)

there was one—a man by the name of Scharnakow, that had some stock. I think that was about all. Directing my attention, as you are, to the list of stockholders in the Missoula Mercantile Company—October 24, 1891 to October 27, 1898, heretofore read in evidence—E. L. Bonner, a stockholder in the Missoula Mercantile Company, was a stockholder in the Big Blackfoot Milling Company; so was R. A. Eddy; E. M. Eddy was not. I have already testified about myself. C. H. McLeod was an owner of stock in the Big Blackfoot Milling Company; so was J. M. Keith and T. G. Hathaway; but H. T. Van Wort; F. T. Stirling; W. A. Mentrurn; T. B. Thompson; H. C. Keith; J. P. Mannard; J. M. Price; T. T. McLeod; C. A. Barnes; D. H. Ross; T. Hosey; W. S. Settle; F. W. Jones; J. F. Dorman; J. B. Jenkins; T. E. Bassler; G. W. Dorrity; C. L. McLeod and W. H. Allison, while stockholders in the Missoula Mercantile Company were not stockholders in the Big Blackfoot Milling Company. G. Moser was secretary of the Big Blackfoot Milling Company, but I don't think he was a stockholder. Scharnakow appears to have had one share of stock in the Missoula Mercantile Company, and he became a stockholder in the Big Blackfoot Milling Company a few months before it sold out. C. S. Bonner, L. J. Bonner and B. A. Bonner, while appearing as stockholders in the Missoula Mercantile Company were not stockholders in the Big Blackfoot Milling Company. I know about the Big Blackfoot Milling Company at one time having owned twenty-two shares of stock in the Missoula

(Testimony of A. B. Hammond)

Mercantile Company. They acquired that stock from W. H. [603] Hammond, and I know how W. H. Hammond acquired that twenty-two shares of stock. The circumstances were as follows: D. H. Ross ran a lumber yard and he got in debt; he bought his lumber from W. H. Hammond and got in debt to him; later on W. H. Hammond bought him out and took some land that Ross had on the Blackfoot and shares of stock in the Missoula Mercantile Company, in payment, and ran the business, though under the name of Ross, until such time as the Big Blackfoot Milling Company commenced to operate actively, and then the Blackfoot Milling Company took over the lumber yard at Missoula and W. H. Hammond turned in the shares of stock that he had got from Ross to the Big Blackfoot Milling Company and they paid for them. I mean that the Big Blackfoot Milling Company bought the lumber yard from W. H. Hammond; it did not have any interest in that property before the time it purchased it from W. H. Hammond. I had no interest in the D. H. Ross & Company lumber yard. W. H. Hammond did not at any time hold any interest in that yard for me, nor did either of the members of the firm of D. H. Ross & Company at any time hold any interest in that for me. I was first upon the Blackfoot River after the purchase of the remnants of the dam by W. H. Hammond, in the spring of 1886. I went up there to see the log drive—about twelve or fifteen miles from Bonner. At the time I went to see that log drive, I had no interest in those logs or the log drive—no pecuniary interest of any sort. The occasion of my

(Testimony of A. B. Hammond.)

going there was through curiosity. I had not seen a log drive since I had driven on the Penobscot, when I was a boy. I wanted to see the operation. George L. Hammond was in charge of that drive at that time. As to where W. H. Hammond was at that time—his headquarters were at Bonner—he may have been with me. I don't really recollect whether he made that trip up there with me or not. George L. Hammond was [604] my brother, and he was foreman of the drive and had charge of it. In addition to his occupation as foreman of the drive, he was a farmer and stock-grower in the Blackfoot country and he also was in charge of the logging operations for W. H. Hammond. He had a farm on Elk Creek and one at Ovando. I never had any interest in the farm of George L. Hammond, or in his business. He was seven years older than I. He came to Montana in 1867, the same year that I came. We came together. On this occasion on the Blackfoot, I did not, nor did I on any other occasion, ever say to my brother, George L. Hammond, that if any more men went down, he would go down, too. I have seen a man named Patrick Joyce. He is a saloon-keeper. I don't know where his saloon is now, but he had one at Cannas Prairie. Ever since I knew him, he was in the saloon business. I never, in the presence of Patrick Joyce, on any occasion on the Blackfoot, or elsewhere, say to my older brother, George Hammond, that the next man that went down, he would go down, too. No such conversation ever took place. I never attended another drive on the Blackfoot. At

(Testimony of A. B. Hammond.)

the time I attended the drive on the Blackfoot, I had no interest of any character in any of the operations that were being extended in the Blackfoot. At that time George L. Hammond was neither directly nor indirectly in my employ in any capacity. The next time I was on the Blackfoot after the log drive of 1886, was on a hunting and fishing expedition in the year 1888, I think. It was the second time I was up there. The only time I was up there until last summer, that is twice in all. I never at any time gave any orders or directions to any of the men with regard to the operation on the Blackfoot to any person. With regard to the work in the Hellgate Canyon, when we cleared the right [605] of way, we cut up lots of stuff that we made into cord-wood. In a general way, I know that during the construction of the Northern Pacific, all of their trains were using cord-wood, which was cut up by our people in clearing the right of way and for a number of years afterwards until 1888. A majority of their trains were using cord-wood for fuel. I have seen men who were not employed by myself cutting cord-wood in the Hellgate Canyon other than in clearing off the right of way in this same district between McCarty's Bridge and Bonita. As to the kind and character of trees that were cut for cord-wood, they cut the trees that were handy to the road first, and the trees that would split easy and as good timber as they could find. Much of the timber so cut for cord-wood was good logging timber. I knew a boy named Felix Cyr. I knew Dumas, his father. I first knew him down East.

(Testimony of A. B. Hammond.)

Q. It appears from the testimony of Felix Cyr, when he was a boy fifteen years old, you saw him at Bonita driving a team and you said to him: "Where is your dad?" and he said "He is over home," and you said "You better go back and tell him to drive his own team, you are too small." Do you remember any such conversation?

A. No, sir, I do not, but it may have occurred; I knew Dumas Cyr and his family and I may have made use of such an expression as a pleasantry. I have no recollection of it.

(Witness Continuing:) I never gave any orders to any persons about any transaction in connection with the logging operations at the Bonita Mill. I did not have anything to do personally with the construction of the Bonita Mill on section 14, on the land [606] here in controversy. Mr. Eddy superintended the construction of that mill upon that ground. At that time Mr. Eddy was acting for the Montana Improvement Company, carrying out his agreement with Fred A. Hammond, as to which agreement I have already testified. While that mill was in process of construction, I was upon that mill site at Bonita once, that I recollect. I was there at the mill site before the mill was moved there. I looked at the site. I was there a short time. I think I was on a work train and I stopped off there for a short time, perhaps half an hour or an hour. At that time I gave no orders or directions to any person with regard to the construction of that mill. As to when I was next on the Hellgate, the property here

(Testimony of A. B. Hammond.)

involved, I may have been at the Bonita Mill after Mr. Fenwick owned it once or twice. But I was never on the timber land. By the timber land, I mean the land that is reported to have been cut over. Before the Montana Improvement Company began the construction of the mill under the contract I have referred to, I had known that there were mines in operation at Wallace and there were mines there in operation at Bearmouth. I knew of men working in the mines in Wallace. It was quite a mining district there over near Wallace. Bearmouth was a large mining section and there were a great many mines at Bearmouth,—rather up Bear Gulch—seven or eight miles up the gulch, they ran quite a distance. I should judge the mines at Bear Gulch would be about ten or twelve miles east of Bonita. I built the railroad through the Hellgate and cleared the right of way and lived in that vicinity since 1872. I had been over the road in that Hellgate Canyon from Bearmouth to Wallace, and in the course of those years, a great many times—on the railroad and the wagon road, before the road was built. While we had the [607] contract for the clearing of the right of way, a part of the time I was on the ground. I was familiar with the Hellgate Canyon and the mines in that vicinity I have testified to. My belief as to the character of the lands along the Hellgate Canyon with reference to their being mineral or non-mineral between the station of Bonita or the Bonita Mill on the west and Tyler Gulch upon the east, was that they were mineral lands.

(Testimony of A. B. Hammond.)

Q. The witness, W. A. Cook, made deposition in which he said:

“I was there at one time when Mr. Hammond had a fuss with George Ritz; he had a contract logging; they almost came to blows in Bonita.

“Q. We will finish that out—when was that, what year was that?

“A. That was before they put the mill there; this man Ritz logged about a year before the mill was moved there and banked them on the river above by the Wills place.”

On cross-examination the same witness said in response to the following question:

“Q. What was this fuss between A. B. Hammond and Ritz?

“A. Ritz, it seems, had taken a contract from Mr. Hammond to cut logs; and he afterwards sold the logs to A. C. Kise & Company, and was going to drive them down some place down Rock Creek, and Hammond wanted the logs and he afterwards got them. Kise didn't use them at all; Hammond got them from Ritz afterwards, and he logged for two or three years after that.”

I will ask you if you knew of a mill run by A. C. Kise & Company at Rock Creek? [608]

A. I knew that there was such a mill there.

(Witness Continuing:) Rock Creek is three miles from Bonita, down stream—towards Wallace. I did not know a contractor who spelled his name R-i-t-z, which is the way it is spelled in the deposition. I knew a man named Rich. I have no recol-

(Testimony of A. B. Hammond.)

lection of having any such controversy as is mentioned in Mr. Cook's testimony with a man named Rich. I never knew of any man by the name of Ritz, I knew a man by the name of Rich and he had an account at the Missoula Mercantile Company's store. He had a tie contract and pile contract from E. L. Bonner & Company and during that time that he had those contracts he was furnished with goods by E. L. Bonner & Company. He had the tie and piling contracts during the construction of the Northern Pacific Railroad. I never at any time had any controversy with him over a contract for the cutting of saw logs. I never had any trouble with a man named Rich with regard to any logs or timber that he had cut or piling that he had cut. I do not remember any question arising upon the subject at all at any time between me and Rich or Ritz in 1884. I do not understand how that could be. There was no mill that those logs could go to. The Wallace Mill was not a mill to which logs could be floated. It was not on the river. It was quite a long distance from the river and logs could not be floated down to the Wallace Mill.

Q. Did you ever have any difficulties at any time with a man named Rich or Ritz concerning the use that he made of logs that he had cut, while he had an account with the Missoula Mercantile Company or piles that he had cut [609] before for Eddy-Hammond & Company?

A. Well, Rich had a contract for piles which he did not furnish. At different times Eddy-Ham-

(Testimony of A. B. Hammond.)

mond & Company made efforts to try and get our money for these piles that he was supposed to deliver and did not deliver. I have no recollection of any controversy with him at the time referred to.

(Witness Continuing:) I did not have any controversy with him at any time about any logs for the Bonita Mill.

Q. You do recollect a controversy with him about some piling, or a matter with regard to collecting from him on a bill that he owed to the Missoula Mercantile Company at a time when he was under contract to furnish piling for E. L. Bonner & Company?

A. It was the bill of Eddy-Hammond & Company. We were in business in 1884 then, not the Missoula Mercantile Company. This, I understand, was supposed to have taken place in 1884. That is the year before the Bonita Mill went in.

(Witness Continuing:) During the course of the construction of the siding for the Bonita Mill, I do not think I was there upon more than the one occasion that I have testified to. I have no recollection of being there but once. I do not know a man named Thomas Van Keuren. I know of his evidence, but I have no recollection of the man.

Q. Thomas Van Keuren testified in substance:

“Hathaway took me to office of company in Missoula and introduced me to A. B. Hammond. He asked me first what I worked at. Told him was ox teamster. A. B. Hammond wanted me to [610] go to work at Wallace. I asked what he was paying. He told me. He gave me a letter to go to work, to take to

(Testimony of A. B. Hammond.)

Mr. Henry Hammond. Henry Hammond, it seems, was the 'push' there. I went up there and Henry Hammond told me they were full handed there. He told me to go to Bonita."

Do you remember ever having sent Van Keuren to Henry Hammond at Wallace?

A. I don't know. I may have sent him. I sent Henry Hammond while he was at Wallace logging a good many men. Whenever he wanted men he would telephone down and either I attended to it or somebody else.

(Witness Continuing:) Concerning what has been said in this case about the employment of men and the sending of men to different places for employment, a good many of the mills were situated at places where there were no postoffices and at some of them there were no stations. When they wanted men they would send down to Missoula, send word, and we would send them up. That applied to farmers, and stockmen, as well as lumbermen. A farmer came in from the country who had a ranch fifteen or twenty miles away, and he wanted a teamster, or a man who could run a threshing machine or a mowing-machine, or a self-binder, or a man who could milk cows, and he was very apt to leave word with us if such a man came to Missoula that wanted such a job to send him up to him. The Eddy-Hammond & Company and the Missoula Mercantile Company did a lot of that business. That applies also to graders and it applied to my work in the building of the Bitter Root road—my sub-contractors as well,

(Testimony of A. B. Hammond.)

and I furnished them with men and I sent to Utah and brought men out from that country for graders. We had little mills on the Bitter Root road and we [611] had to have lumbermen to run them and we combined with other people who had mills and sent east and elsewhere to get lumbermen. When those men came to the country they came to Missoula, and if they were connected with the people that we sent to bring them there, why, we found out and we knew where we wanted men and we told them where to go. I remember the occasion of Mr. Hathaway's going East. I think he went East twice. I would not be sure. The circumstances connected with Mr. Hathaway's going East were these: We wanted lumbermen and others wanted lumbermen. I wanted lumbermen in the Bitter Root Valley and W. H. Hammond was short of men and Mr. Fenwick was short of men and Mr. Greenough and I think Haycock, and he was sent to Minneapolis and the expense of sending him there was borne *pro rata* by the parties who got the men.

Q. The same witness, Van Keuren, testified to the effect:

"I got two horses through Mr. Hammond in Missoula, bought one direct from A. B. Hammond and Mr. Hammond got me the other one."

"Q. I think that you testified that you bought one or two horses from Mr. A. B. Hammond, did you not?"

"A. Yes, I did.

Q. Was it one or two?"

(Testimony of A. B. Hammond.)

“A. Two horses.

“Q. Now, how did you pay for those horses?

“A. With those logs that I cut for them at \$4.00 a thousand.

“Q. In other words, in your account with the Missoula Mercantile Company you were charged with the price of those two horses, isn't that the idea?
[612]

“A. I was charged with the price of those two horses.

“Q. And when you came to settle up with the Missoula Mercantile Company you were paid just that much less; that is to say, the price of those two horses from what was coming to you?

“A. Yes, and less the supplies that I had.”

Do you remember the specific occurrence with Van Keuren?

A. No, I do not. I did not go into the details of the business to that extent at that time, but the Missoula Mercantile Company dealt in horses, bought and sold horses. It may have sold them to Van Keuren, as it did to anyone else.

(Witness Continuing:) If Van Keuren had something coming to him on account of his contract for furnishing logs to Mr. Fenwick or to Mr. Fred Hammond and Van Keuren had purchased supplies from the Missoula Mercantile Company, the course of dealings under conditions of that kind at the Missoula Mercantile Company's establishment, would be, I suppose, that Van Keuren would be charged up with whatever he got, and when he got paid by Mr. Fen-

(Testimony of A. B. Hammond.)

wick for his logs, Fenwick would probably give him an order on us and when he came down to get his money, the Missoula Mercantile Company would deduct the amount of his bill and pay him the money, the balance, if he had any; and if the Missoula Mercantile Company had sold him some horses, they would deduct the amount of the horses, the same as they would for merchandise or anything else. Neither the Missoula Mercantile Company, nor myself individually, nor the Montana Improvement Company ever purchased any logs from the said Van Keuren. I have seen a man named John Cunningham. [613]

Q. John Cunningham in his deposition testified as follows:

“We told him that Hathaway sent us out, and asked him which way we would go, so he told us to go up the Blackfoot River, and he said he wanted to send a team up, so we took the horses along.

“Q. That was all he said?

“A. Yes, sir.

“Q. When you got up there, who put you to work?

“A. George Hammond.

“Q. Did he tell you what your wages were going to be?

“A. He never set no wages; Hathaway set our wages, \$35.00 a month.

“Q. Mr. A. B. Hammond did not make any arrangement with you about that?

“A. No, sir, never mentioned wages.

“Q. He never mentioned employment at all, ex-

(Testimony of A. B. Hammond.)

cept he told you how to go up the Blackfoot River?

“A. Yes, sir.”

Do you remember ever having any such conversation as that with John Cunningham?

A. No, I don't remember any such conversation.

(Witness Continuing:) Such a conversation may have taken place. If he came in and said he was a woodsman, we would know where such men were most in demand. I have no recollection of having any occasion to send teams up the Blackfoot River at any time. Teams were sent up from Wallace generally. In those days there was no wagon road up the Blackfoot. They went around by Wallace. There was a trail up the Blackfoot. I knew William [614] Harley.

Q. He testified: “A. B. Hammond recommended me as a logger to Fenwick. Met A. B. Hammond on the street; said that Fenwick wanted a logger. Said, ‘I have recommended you as a logger.’ That is as near as I can remember the words, twenty-six years ago. After that conversation with A. B. Hammond went to work for Fenwick.”

Do you remember anything about any occurrence of that kind?

A. I don't remember, but it is quite likely that I would recommend him if he was a logger.

(Witness Continuing:) I do not know that I did. I never employed him for Fenwick. I never made any engagement to employ him for Fenwick. I knew him as a boy. I also knew him as a man because he worked for me in the construction of the

(Testimony of A. B. Hammond.)

Northern Pacific Railroad. I recommended him, I suppose. I would have recommended him if he had asked me to.

Q. Mr. Milton Hammond testified as follows: "A. B. Hammond sent me up in the Blackfoot from Missoula in, I think, September, 1887. He gave me a letter to George Hammond. George Hammond was up there; supposed to be walking boss. Went to work as a scaler. Nothing was said when I was employed as to who would pay me. A. B. Hammond gave me the letter to George Hammond, said I was a scaler. I wrote A. B. Hammond from Stillwater, Minnesota, about the business, and he wrote me to come out. Said he would give as good a job as I was capable of filling. When I came out, talked to him some, and he sent me to George, as I said before. In a letter to me at Stillwater, A. B. Hammond told me to hire forty men and come out with them. [615] I picked up a few men there and sent them out here, and finally came myself. Of course, I had correspondence with him. I looked him up. He wanted lumbermen."

Do you remember any such correspondence as that with Milton Hammond on the subject of bringing men out?

A. No, sir. In those days we were doing what we could to get men to come into the country, both lumbermen and graders and millmen and laborers of all kinds.

(Witness Continuing:) It may have been that such a letter was written by me. At that time we had in

(Testimony of A. B. Hammond.)

Missoula one hundred and fifty men in our mercantile house and later on I had men in the bank, the First National Bank, that I was connected with. I had quite a large operation up there in the Bitter Root, the building of fifty miles of railroad. That is quite a large operation. If Milton Hammond had been a railroad man, I would have taken him up there myself where I was operating. With regard to sending him over to the Blackfoot, assuming that I did, I had no authority whatever to hire men and fix their terms of employment at any time. I never made any contract with any men whereby I employed them for a designated task and fixed their rate of wages either on the Blackfoot or the Hellgate.

Q. He testifies, without saying just when it occurred: "I remember one conversation with A. B. Hammond about the scale up there. He asked how the scale compared with the railroad scale. Told him I did not know; that the orders were not to let each other know; he told me he thought it would be a good thing to understand each other. Never at any time received any directions from A. B. Hammond about my work. Never saw A. B. Hammond on the Blackfoot at all. Saw him at the [616] Bonner Mill. He was just there on a kind of picnic or excursion. Never had any conversation in Missoula Mercantile Company's store about cutting of lumber."

Do you remember any conversation with him about the scaling operations?

(Testimony of A. B. Hammond.)

A. No, sir.

Q. You remember no such conversation?

A. No, sir.

Q. Mr. W. H. Longley testifies: "I think it was in 1887, 1888 and 1889 I worked for A. B. Hammond at the Blackfoot Mill at Bonner. I was running a planer there."

On his cross-examination he said: "Henry Hammond employed me to work at Bonner. I supposed when I said on direct examination that I worked there for A. B. Hammond, that that was the same thing. W. H. Hammond employed me. I simply supposed A. B. Hammond was interested in that."

As a matter of fact, were you interested at any time in a planing mill upon the Blackfoot?

A. No, sir. I was interested in a planing mill on the Blackfoot after it was taken over by these companies.

(Witness Continuing:) I was never individually interested otherwise than as a stockholder in those companies—as a stockholder in the Big Blackfoot Milling Company and the Blackfoot Milling and Manufacturing Company. I did not know of my own knowledge at any time as to the precise sections or quarter sections or subdivisions of land upon which the Big Blackfoot Milling Company was doing these logging operations. For instance, as to section 18, township 14 north, range 15 west, and the so-called Boyd trespass on section 22-14-14, and the Edgar claim [617] in section 28, township 14 north, range 14 west. I did not know that they were

(Testimony of A. B. Hammond.)

cutting on any of those pieces of land at any time or that Henry Hammond was cutting on the Edgar place. I never was on any of those lands that I know of. I knew nothing about the cutting upon them. I do not know of any particular instance of horses being sent from the Blackfoot country by Henry Hammond or by anybody else for sale at Missoula. I remember, in a general way, that horses were sent down from the Blackfoot country by Henry Hammond for sale.

Q. R. K. McLaughlin testified: "George Hammond ordered me to take horses down to Missoula. Horses belonged to Blackfoot Milling Company, to the best of my knowledge. That is my opinion, not my knowledge. In my opinion, A. B. Hammond owned a stable in Missoula. George Hammond told me to put the horses in that barn. Can't repeat what conversation I had with A. B. Hammond about them."

Do you remember anything of that particular incident?

A. No, sir. I had no barns.

(Witness Continuing:) As to the barns there were in Missoula—there was a barn there that belonged to Eddy-Hammond & Company and afterwards to the Missoula Mercantile Company and was used by the Missoula Mercantile Company for keeping its delivery horses. It was a large barn and a corral. We kept our freighting outfit there, when we used to freight from the Central Pacific Railroad into Missoula by wagon. I do not remember any horses

(Testimony of A. B. Hammond.)

belonging to the Blackfoot Milling Company ever being brought there for sale—but no doubt there were horses sent there for sale by Henry Hammond. He sent some horses down and asked us to sell those horses. [618] It may have been that Henry Hammond closed out his logging outfit and that horses were sent over during the time that he was closing that out. There were details of the business that I did not take the responsibility of. We had a man, a horseman, to look after the horses, and I did not pay very much attention to the supervision of that business. I heard the testimony of McLaughlin, that he was stopping at one hotel and that I told him to go to the Florence Hotel. The Rankin House was the first hotel that he mentioned. The Rankin House was right directly opposite the Missoula Mercantile Company, right across the street. The Florence Hotel was across the street on Higgins Avenue. There wasn't very much difference between the proximity of either hotel to the Missoula Mercantile Company's store. The Rankin House was right in front of the building, across the street, and the other hotel was on the other street. The Rankin Hotel was a dollar a day house, where the lumbermen generally put up, and the Florence was in those days a three to five dollar a day house, where the fancy drummers stayed. I do not recollect ever telling any man who brought some horses from the Blackfoot to leave the Rankin House and go over to the Florence Hotel and stay there. In 1885 I was connected with the ownership of quite a large amount

(Testimony of A. B. Hammond.)

of land around the Helena Depot and in that section where the Helena Lumber Yard was situated. I platted it out into town lots and we had constructed quite a number of buildings. I got the lumber for the buildings from the Helena Lumber Company; in fact, they took the contract and put up some small buildings. Now, I used to go to Helena on other business and business connected with the railroad operations that I was carrying on. I would always go down and look over the property that I was interested [619] in in that section and go into the Helena Lumber Company's office and visit with them. I have testified that the Montana Improvement Company at one time owned the Helena lumber yard and sold it to Mr. Coombs and that he then ran that lumber yard. The sale made by the Montana Improvement Company was largely upon credit. I believe the Helena Lumber Company assumed the indebtedness of Coombs to the Montana Improvement Company. I might have made, as Mr. McCulloch testified, an inquiry to the effect that I asked him at one time concerning whether or not the stockholders who had subscribed for stock in the Helena Lumber Company had paid in their subscriptions. I have no recollection of having made that inquiry, but the Montana Improvement Company was in liquidation at that time and dependent upon the sale of the properties that it had made for part cash and part credit to pay their obligations—their own debts. To that extent I suppose I was interested in knowing how they were getting on with

(Testimony of A. B. Hammond.)

their business. I may have made such an inquiry, but I don't recollect of having made it. I did not, as a matter of fact, have any interest of any kind or character in that Helena Lumber Yard. The Helena Lumber Company purchased lumber from W. H. Hammond, at Bonner. They were carried by him to quite a large amount, so much so that when the Big Blackfoot Milling Company took over the business of W. H. Hammond, they bought an interest in the Helena Lumber Company with another lumber company—the A. M. Holter Lumber Company, and it was changed to the Capitol Lumber Company. I know that the indebtedness of the Helena Lumber Company was considerable. I did not have directly to do with the collecting of the assets of the Montana Improvement Company. I was in the Company's employ. [620] I was interested in the collection of its assets and I was interested in seeing these accounts paid, but I had nothing to do with the collection of these assets. With reference to cutting upon the Hellgate by Fred A. Hammond or by Mr. Fenwick during the time their mills were in operation, I had no knowledge as to the place or places from which they or either of them at any time procured any logs for their mills. I did not know where they were cutting their logs. I have heard some testimony read here with regard to taxes that appear to have been assessed to the Missoula Mercantile Company.

Q. I call your attention to Plaintiff's Exhibit No. 10. There are certain items there which appear

(Testimony of A. B. Hammond.)

to have been assessed to the Missoula Mercantile Company, one being the Fowler Mill, the Tyler Mill, the Williams Mill and the Silver Thorn Mill. Do you know anything about any of those mills?

A. The Tyler Mill and the Fowler Mill and the Silver Thorn Mill, I do, they were little mills that were put in the Bitter Root Valley and were owned by the parties who built the Bitter Root Railroad, and those mills were afterwards sold to the Blackfoot Milling & Manufacturing Company.

(Witness Continuing:) I never authorized or directed, nor was I ever present at any meeting of the Board of Directors at which it was authorized or directed, that the Missoula Mercantile Company should return to the assessor any property. I never authorized any person to make return of the Blackfoot Milling & Manufacturing Company's property or the Big Blackfoot Milling Company property to the assessor, either in the name of the Missoula Mercantile Company or under any other name. I know a piece of property called the Eddy residence in Missoula. It belonged to R. A. [621] Eddy.

Q. I notice upon this list that that is assessed to the Missoula Mercantile Company. Did the Missoula Mercantile Company have any interest in that piece of property? A. No, sir.

Q. Another, E. L. Bonner residence. Did E. L. Bonner have a residence in Missoula?

A. Yes, and a fine one.

(Witness Continuing:) That did not belong to the Missoula Mercantile Company. I know a block,

(Testimony of A. B. Hammond.)

called the Jordan Block, that belonged to the Missoula Mercantile Company. I know a block called the Hammond Block, that belonged to the Missoula Real Estate Association. The Missoula Mercantile Company did not have any interest in the Hammond Block whatsoever.

Q. I call your attention to the assessment of the Florence Hotel and Eddy Block to the Missoula Mercantile Company.

A. Those two buildings belonged to the Missoula Real Estate Association.

(Witness Continuing:) The Missoula Mercantile Company did not have any interest whatsoever in the Missoula Real Estate Association. I have no personal knowledge of how it was that these different properties not belonging to the Missoula Mercantile Company happened to be assessed to the Missoula Mercantile Company.

Tuesday, February 4th, 1913.

Cross-examination.

I was not connected with both firms known as E. L. Bonner & Company. I was connected with E. L. Bonner & Company that took the contract to furnish the Northern Pacific [622] timber, ties and piling and clear the right of way for about two hundred and eighty miles. That firm had its headquarters part of the time at Missoula and a part of the time at Deer Lodge. E. L. Bonner, of Deer Lodge, looked after the business at Deer Lodge to a very great extent. These two firms were not inter-

(Testimony of A. B. Hammond.)

locked copartnerships. The firm of E. L. Bonner & Company that took that contract was composed of E. L. Bonner, J. H. Robertson, R. A. Eddy and myself. The original Missoula E. L. Bonner & Company was composed of E. L. Bonner and R. A. Eddy, the firm that Eddy-Hammond & Company succeeded. The firm of what we will call the Missoula E. L. Bonner & Company was a partnership composed of the gentlemen I have stated, and it was what eventually became Eddy-Hammond & Company. E. L. Bonner & Company at Deer Lodge, which had the contract with the Northern Pacific, was composed of E. L. Bonner and J. H. Robertson, and the copartnership continued for a good many years after the Northern Pacific was built. It did not have [623] any connection at all in the business or in any other way with E. L. Bonner & Company that I was connected with. It was a distinct copartnership. That copartnership carried on a mercantile business in Deer Lodge. It had no contracts at all for the clearing of the right of way. I was one of the original members of the co-partnership of E. L. Bonner and Company that had the contract for the clearing of the right of way. M. J. Connell, was connected with E. L. Bonner of Butte. I had a one-fourth interest in E. L. Bonner & Company. We were equal partners.

Q. What amount of money did you put into that firm? A. We put in largely our credit.

(Witness Continuing :) It would be difficult for me to tell about what I was worth at that time—to think

(Testimony of A. B. Hammond.)

back thirty-one years and say just what I was worth. I probably was worth \$40,000, approximately. This firm of E. L. Bonner & Company continued in existence for several years. As to the persons in active charge of the work of clearing the right of way for the Northern Pacific under the contract that E. L. Bonner & Company had—the work was divided. Mr. Eddy had charge of everything west of Missoula and when the active work was commenced, made his headquarters at a place called Weeksville, about one hundred miles west of Missoula. The work east of Missoula was looked after to quite a large extent by Mr. Bonner and myself. We let contracts for clearing the right of way. We let no contracts without consultation with each other. In regard to these contracts, I participated both before the letting of them and in their supervision to see that they were fulfilled, as [624] any other partner would. I had to see as to the conduct of the affairs of that company. It was probably equal to that of the other members. When the firm of Eddy-Hammond & Company was first organized, it took over the business of E. L. Bonner & Company of Missoula, which was a copartnership composed of Mr. Bonner and Mr. Eddy, his cousin. I bought a third interest in that firm. For that third interest I paid \$4,000.00 in cash and the balance of what I lacked, I think some three or four thousand dollars, I had credit for—I bought on credit and afterwards paid it up. I was a partner in the conduct of the business of Eddy-Hammond & Company and performed the duties of

(Testimony of A. B. Hammond.)

a partner. In the first years of Eddy-Hammond & Company up until 1882 or 1883, I spent practically all of my time with the business of that firm. Mr. Eddy lived in Missoula. He was active in the business. In 1881 until 1883, Mr. Eddy gave almost all of his time to the Northern Pacific contract, west of Missoula. Mr. Bonner was in Missoula a good part of the time during that period. During 1881 and 1882 and a part of 1883, I was in Missoula a greater portion of the time than Mr. Eddy. We were all in Missoula after 1883. As to the person in charge of the business from 1883 until the incorporation of the Missoula Mercantile Company—our business was pretty well systematized and we had men that attended at that time to the mercantile business very largely. We had outside enterprises that took a great deal of our time, and our staff or organization looked after the details of the mercantile business to a very large extent. During all of this time it is a fact that I did my share towards shaping the policy and affairs of the Eddy-Hammond & Company. The Missoula Mercantile Company was incorporated in August, 1885, and it merely took over, as has been read from the minutes, the business of Eddy-Hammond & [625] Company. Mr. Bonner, Mr. Eddy and myself were about equal owners in that corporation when it was first incorporated. It was largely a sort of incorporation of the old business of Eddy-Hammond & Company—some of the employees were taken in. I was elected temporary president and was president for three months. For awhile

(Testimony of A. B. Hammond.)

after it was organized it was run by the trustees or a committee. Then Mr. Bonner was elected president. I think he continued president until 1889 and I was then again elected president. From then on I continued as president of the company until after this cutting that is complained of passed by. It is a fact that during most of the time when Mr. Bonner was president of the Missoula Mercantile Company I was the vice-president. I was also a member of the board of trustees. I was also a member of the executive committee appointed by the president or vice-president to look after the business of the Missoula Mercantile Company. When Mr. Bonner, who was president of the Missoula Mercantile Company was absent from the territory, and it was necessary to act, I, as vice-president, acted. There were very few meetings of the trustees of the corporation. If we had a meeting of the trustees and Mr. Bonner was not present, while I was vice-president, I presided. You have a copy of the minutes of those meetings and I do not recollect how many of those meetings there were during that time that Mr. Bonner was president and he was absent and at which I presided as vice-president. I cannot tell you how many meetings of that kind I presided over. I do not know it to be a fact that all the time that Mr. Bonner was president of that corporation, there were but two meetings at which he presided over, at a meeting of the stockholders or at a meeting of the trustees as president of it. I don't know how many meetings we had. [626] I know that there were

(Testimony of A. B. Hammond.)

not very many meetings. We seldom had any meeting of the trustees. There was a meeting of the stockholders every year—probably a meeting of the trustees every year. I think it is a fact that the records of this corporation show that I presided over the meetings of the stockholders and that I did present to the meetings of the stockholders a balance sheet showing the condition of the business, the profits and the losses, resources and the general condition of the corporation each year. When the president was not present, I no doubt acted in his stead, if I was present. I don't pretend to recollect back twenty-five years about every directors' meeting that we held and who were present. The meetings were largely perfunctory. We had then an executive committee and we did not hold regular directors meetings unless it was for some certain purpose that the By-Laws provided for. We complied with the By-Laws as to our meetings. They were held annually. I think I was a member of the executive committee of that corporation during all the time from the incorporation of the Missoula Mercantile Company. I would not say just what the duties were of the executive committee offhand. My duties were to act on subjects when we did not have a directors meeting—when it was not necessary, we did not consider it necessary to take it up before a director's meeting. When I was at Missoula and present, I actively participated during all of those years in those meetings of the executive committee. As to the time I was present and the

(Testimony of A. B. Hammond.)

time I was absent—in 1888 and 1889 I was here in California, part of the time. In the spring of 1890 I moved to Oakland. We lived there until 1892. In 1892 I went to Europe for my health and I was in Europe about seven months. When I say [627] I lived in Oakland, I mean my family was living there. I was in Montana part of the time attending to my business. I was not back in the State of Montana looking after my affairs during the time that my family was living in Oakland in 1889 and 1890. I was in Oakland and in California at different places. We had a house there in Oakland for two years. In the spring of 1890 we took a house on Jackson street, Oakland, for two years and we left there about a month before the time was up. During that time I went to Montana several times. I kept in close touch with all my business affairs. I knew what was going on. I had reports sent to me. I was not in ignorance of the business that was being transacted. I had reports sent to me regularly and I knew what was going on. When I went back I co-operated with the management. But my business about that time had largely drifted out of the mercantile and was in railroad business very largely. I was not buying and selling timber lands in 1890. I had no timber lands in 1890 that I know of. During all of the time that I was down here in California I suppose I was consulted on important questions. During the years 1885, 1886 and 1887 I was quite actively engaged in building railroads in Montana and in fact gave up the most of my time to

(Testimony of A. B. Hammond.)

that business. I had an interest in the Missoula Mercantile Company and I co-operated with the others in attending to the business when I was in Missoula. I spent a third of my time away from Missoula and the balance of the time I was in Missoula I was occupied with outside business. When I was in Missoula my office and place of business was in the Missoula Mercantile Company. The construction of the Bitter Root Railroad I carried on from Missoula. Most of the other parties interested [628] with me were men living in Helena and they had headquarters there. That was the financial end. I made frequent visits to Helena to consult with them. The Bitter Root Railroad was started in 1886. I think we commenced in the very early spring of 1886 surveying and getting rights of way and making locations. I could not tell you when the active work of construction commenced. It was sometime in 1886. There is a great deal of preliminary work to do leading up to the building of a railroad, financing it and matters of that kind. The road to Remini, Laurel, Phillipsburg and Cole Creek, and these other roads, were started in 1886. The road from Logan to Butte was started, I think, in 1887, and the Remini road, I think, sometime earlier. The Remini road was a short road. It was eventually built to Marysville. It is a little side track up the valley back of Helena—we built a road out the same time to Marysville. That road was, I think, about twenty-five miles long. The Blackfoot Milling and Manufacturing Company was incor-

(Testimony of A. B. Hammond.)

porated late in 1888. I became a stockholder in it about the same time it was incorporated. I think I became a director of that corporation. I would not be sure. I think I was a director when the company was incorporated, but I am not sure that I was. Probably if I did become a director at its incorporation, I continued as such during its entire life. I am not sure, I think I was a director. Held no office in the company outside of director. About the time of the incorporation of the Big Blackfoot Milling Company I became a director in the Big Blackfoot Milling Company and I continued to be a director of that company until I finally sold my stock to Mr. Daly. I do not think I was appointed trustee by the other stockholders [629] and all of the stock was placed in my name to consummate the sale to Mr. Daly. I participated in that sale as a stockholder. The stock was sold to Mr. Daly and was deposited by the stockholders—at least that is my recollection of the transaction—in the First National Bank. I don't think all that stock was transferred to me as trustee or that the greater part of it was. I don't remember positively. I have told you what I do remember about it. I remember that it was not transferred to me. I deposited my stock, like any other stockholder, in escrow, and the trade was made and Mr. Daly paid for the stock and took it over. The purchase price of that stock was not paid over to me. The sale to Mr. Daly included some timber land that I owned on Nine Mile Prairie, about thirty miles west of the Big Blackfoot River. Mr. Daly

(Testimony of A. B. Hammond.)

had a sawmill—I say Daly, I think it was the Anacoda Company, but he had a mill down there and he didn't want to buy the Big Blackfoot Milling Company unless he could get these lands that I had near to the mill that he owned. It was because of that largely that I was drawn into the negotiations in the manner that I was. Of course, I would have been drawn into them anyway as a stockholder. That deal would not have been consummated without my consent. We could not have sold without the consent of all the stockholders. At that time my proportionate ownership of the stock was, I think, the same as it had been before, that is to say, about twenty per cent. I don't remember how much in actual cash I received out of the sale of the Big Blackfoot Milling Company stock to Mr. Daly, but I received several hundred thousand dollars for my holdings on Nine Mile Prairie. I would say I had something like thirty-five hundred or four thousand acres of [630] land. I think the Montana Improvement Company was incorporated in 1882 and I think I was one of the original incorporators of that company. I was treasurer and manager of that company. I was manager of that company until, I think, about 1885. As to the person who succeeded me as the manager of that company—at that time the Montana Improvement Company decided to go out of business and it did go out of business and proceeded to liquidate its affairs. It took several years to collect in the indebtedness. It is probable that the Montana Improvement Company filed an annual statement

(Testimony of A. B. Hammond.)

under the state law of Montana, clear on up until 1897. The statement will show just what they did. I would not pretend to say off-hand what those statements were, that were filed twenty years ago. I did not keep any track of them, I do not now hold my interest in that company. I sold out the interest I had. I think, in the 90's. I did not have anything to sell anyway. I would not be sure that as long as there was any property or any assets or value in the Montana Improvement Company, I continued as a stockholder. There was some small value to the stock. I know of stock being sold in Missoula at sheriff's sale—two hundred and fifty thousand dollars worth of stock and it brought in, I think, two hundred dollars, or something like that. The Northern Pacific Company always owned this fifty-one per cent of the stock of the Montana Improvement Company. They had a contract for it. I think I ceased to be a director of the Montana Improvement Company after it decided to wind up its business and liquidate. It was in 1885. After that the Montana Improvement Company had no business. It decided to wind up its affairs and go out of business. Mr. Hathaway continued as an employee of the company and had as much to do with the [631] winding up of the company as anybody—probably more. I don't think the company ran the Wallace Mill until along in 1886. It went up there and sawed some logs that were hauled to the Wallace Mill in 1885. It sawed up those logs and the lumber that was there was disposed of during the liquidation of the business. Mr.

(Testimony of A. B. Hammond.)

Fenwick and Mr. Henry Hammond were not down there at Wallace in the employment of the Montana Improvement Company along in 1886. That plant was dormant in 1886 and what was done at Wallace was in line with the liquidation of the affairs of the corporation, the winding up of its business and disposing of its properties; they had their homes there and they remained in charge of the property, disposing of it. They were perhaps in the employ of the Montana Improvement Company part of the time and part of the time they were not. I knew at the time of Mr. Fenwick's negotiations for the purchase of the Bonita Mill that he was negotiating for it. As to how I learned that—well, I was not such a business man but what I would know about a proposition of that kind that was going on in or about Missoula, especially when they were family relatives. I knew what they were doing. I could not tell you just now who told me of these negotiations between Fred A. Hammond and George W. Fenwick. Perhaps Mr. Fenwick might have told me about it. They may have mentioned it. I could not say that I knew before that time that Fred A. Hammond was rather dissatisfied with the business down there at Bonita and wanted to get out. Evidently he wanted to sell or he would not have sold. He did not consult with me at all about selling. I don't think Mr. Fenwick consulted with me about the purchase; he may have told me that he was negotiating with Fred, but I don't know that he did. I would not be positive [632] whether Mr. Fenwick or Fred Hammond,

(Testimony of A. B. Hammond.)

either one, said anything to me about it. I might have learned it from Mr. Hathaway or anyone else that was connected with me or had talked with them. I believe the mill site on Bonner is on this section 22 that we have referred to so often. I do not recollect what the deed did convey from the Montana Improvement Company to W. H. Hammond. I do not think the Montana Improvement Company owned any land. I do not know from whom W. H. Hammond got the land in section 22. I think he acquired an interest in that section 22. I think he homesteaded it or took it up under a pre-emption, or something of that kind, but I don't know. He may have. I don't know anything about it except from hearsay. It was his own business. At the time of the transfer from the Montana Improvement Company to W. H. Hammond, by this conveyance the Northern Pacific Company had a contract for fifty-one per cent of the stock. This agreement was with the Northern Pacific. The Montana Improvement Company was the other party to the agreement. At the time this contract was made by the Montana Improvement Company with the Northern Pacific Company, I could not tell you who the stockholders were in the Montana Improvement Company. I was one of them.

Q. Was this contract ever fulfilled, this contract for fifty-one per cent of the stock? Was the stock ever transferred to the Northern Pacific Company?

A. I don't think it was transferred. I would not be sure about that, but we had a contract to give them the stock.

(Testimony of A. B. Hammond.)

(Witness Continuing:) As to whether that was just simply a gift to the [633] Northern Pacific—the contract speaks for itself. I don't remember the details of the contract. Those transactions took place some twenty-five or thirty years ago. There was a contract with the Northern Pacific Railroad Company whereby it was to have fifty-one per cent, and it was because of that contract that the Government objected to the Montana Improvement Company operating under the rules of the Secretary of the Interior, and it was because of that contract that we decided finally to go out of business. While we thought that we had, as a local corporation in Montana, the right to operate under the rules of the Secretary of the Interior—by which I mean cutting timber on mineral lands for mining and agricultural purposes in accordance with the act of June 3, 1878. The Montana Improvement contract was no subterfuge to get away from the act of 1875 allowing railroad companies to cut. It was an absolutely *bona fide* transaction. As to what the Northern Pacific gave to the Montana Improvement Company for the fifty-one per cent of the stock, it was to have—the contract provided that the Montana Improvement Company should have the right to cut Northern Pacific timber from McCarty's Bridge in Montana to Pend O'reille Lake in Idaho, the exclusive right, I think, for two hundred (200) miles. We were to pay for the timber as we cut it and it was supposed by the gentlemen who promoted the Montana Improvement Company, of which Mr. Bonner was the

(Testimony of A. B. Hammond.)

head and front, that it was a very valuable contract, but it turned out otherwise, and because of the objections on the part of the Secretary of the Interior, we went out of business. It was not on account of any of the lawsuits that were brought against the Montana Improvement Company, for at that time there were no lawsuits brought against the company. We had heard that the [634] Commissioner of the General Land Office, Mr. Sparks, held that because of this contract with the Northern Pacific, wherein it was to have fifty-one per cent of the stock, that the Montana Improvement Company, a corporation, was not entitled to the privileges under the act of June, 1878, which is an act which gave the right to cut on mineral lands, but the right was not given to railroad corporations, and while we did not agree with the Secretary, and our attorneys—

Mr. HALL.—You considered, did you not, that by giving the Northern Pacific Company fifty-one per cent of the stock, you holding the remaining forty-nine per cent, that the Montana Improvement Company had the right to cut under the act of June 3, 1878? A. Well, we—

Q. Just answer the question, yes or no?

A. We considered it, but we did not—there was a question there, a question of law and because of that question we decided to go out of business and did go out of business.

Q. The attempt was made, wasn't it, to permit the Northern Pacific Company to get the benefits of the act of 1878, by giving it fifty-one per cent of the stock

(Testimony of A. B. Hammond.)

of the Montana Improvement Company? That was the arrangement, wasn't it?

A. Well, the arrangement was to give the Northern Pacific fifty-one per cent of the stock.

Q. Yes, and that the Montana Improvement Company should then go on and claim the benefits of cutting under the act of June 3, 1878?

A. The Montana Improvement Company expected to operate under that act. [635]

The COURT.—When you concluded to go out of business, did the Montana Improvement Company surrender this contract for the right to cut on the Northern Pacific lands for the two hundred mile limit?

A. The Northern Pacific Company—yes, that contract became a dead letter.

Q. Just fell?

A. Just fell. I say the Montana Improvement Company then decided to go out of business. There wasn't enough in it to—

Mr. HALL.—This contract was the life and sinew of the Montana Improvement Company?

A. Well, it speaks for itself.

(Witness Continuing:) It was one of the objects of the organizing of the company, and I suppose the railroad company—I know we thought we were within our rights at that time when we decided to go out of business, and our attorneys thought that we were within our rights. The attorneys that I speak of were Warren Toole and T. C. Marshall. We discussed it also with the attorneys of the Northern Pa-

(Testimony of A. B. Hammond.)

cific. They were at a meeting in Deer Lodge. Senator Saunders was there. Thomas C. Marshall acted as attorney for myself and some of these corporations that I was interested in for a good many years. The firm was Woody & Marshall—afterwards it was Marshall. We had other attorneys. Saunders and Cullen at Helena were attorneys of ours and Warren Toole. [636]

Thomas C. Marshall did not come to the State of Montana until 1880 or 1881. Frank H. Woody was the name of Mr. Marshall's partner. I was in Montana in 1878. I knew men by the name of James House, Matt Coleman and John Fredline. House was a miner at Wallace; I think Coleman was a rancher and Fredline was a carpenter. Mr. Woody had a son; I think his name was Frank H. Woody, Jr. I don't think he was born in 1870. He must have been a very young boy in 1870, if he was born. I remember hearing, as I would have heard any other report, that was generally public, of the organization of the Wallace Mining District at the time it was organized. As to the boundaries of the Wallace Mining District, I heard W. J. McCormick, who was instrumental in effecting the organization, speaking of the Wallace Mining District and its boundaries. McCormick was an attorney at Missoula. I used to know where Medicine Tree Hill is. I had it pointed out to me, but it is long ago. I know where McCarty's bridge is. It is about five or six miles east of Bonita. I knew where the Tyler Ranch was; that was at McCarty's bridge. If you say that Tyler's

(Testimony of A. B. Hammond.)

ranch is in section 23, township 11 north, range 15 west, I will take your word for it. I never knew what section it was in. I testified that the principal amount of timber in that section is from McCarty's bridge to Bonner. The Wallace Mills cut timber directly around them. They did not float any logs from up the river. The best tract of timber was at Wallace. There was considerable of the piling that I have mentioned cut between Bonita and Wallace. There was some of it cut around Bonita, a good deal of it around Bonita and east of Bonita. While the mills were at Wallace, it was not fair to the contractor who took the contract to [637] furnish lumber at that place, to put a mill there and cut the lumber that was to be used for bridge timbers into piling. We aimed to let the piling contracts and the tie contracts where there were no mills. The piling, after it was cut, was hauled to the line of the railroad. The contract provided that the piling and ties should be delivered on the right of way. At that time piling or ties were not hauled for a distance of ten or fifteen or twenty miles from the point where they were cut, unless there was some particular place where they could not wait for the construction trains and they had to have piling or square timbers at once, then we would go out and cut and haul them for these longer distances, but that was an exception to the rule. The contract provided that we had the right to deliver piles, ties and timbers anywhere on the right of way where it was most convenient to get it.

Q. But throughout this two hundred and eighty

(Testimony of A. B. Hammond.)

miles of right of way, there was no place, except in very exceptional instances, where you hauled the piling and ties more than five or six miles that were used in the construction, is that what you mean to say?

A. With the exception—there were piles and ties taken from the Big Blackfoot River and driven down to Bonner.

(Witness Continuing:) A man by the name of Sloan had quite a large contract for delivering ties and piles from the Blackfoot. He went up the river and cut the timber along the river, so he did not have to haul it very far.

Q. But throughout this two hundred and eighty miles of railroad, isn't it a fact, Mr. Hammond, that all along there there was sufficient timber very near and adjacent to the right of way, so that you did not have to transport the ties [638] and bridge timbers any great distance in order to complete the railroad?

A. If you are familiar with that country, you must know that east of McCarty's bridge is pretty near a treeless country for a good many hundred miles near the road; to the west of Missoula on the Flathead Reservation, there was no timber.

(Witness Continuing:) That stretch along the Flathead was furnished with timber from Idaho and Washington. Some timber was taken out of the Hellgate Canyon to build that road along the Flathead Reservation. The timber that went to build the railroad over the divide west of Missoula at Moran's Gulch—the trestle there—was gotten out

(Testimony of A. B. Hammond.)

west of Horse Plains about eighty miles away, and they undertook to supply the timber by means of work trains for the building of that trestle. The superintendent of construction, when he arrived on the ground, objected, and said they would be delayed six months in building that trestle if the lumber had to come from Weeksville, which was some eighty miles away, and he was going to start in hauling it by teams up there at once and would not wait until the road got through, because it would mean a very great delay, which the Northern Pacific Company could not afford to take; so that timber was not used; that is, that timber they had gotten at Weeksville was not used for the purpose it was intended. They had to let another contract; that is, they got the timber out in duplicate. Weeksville was about one hundred and ten miles from Bonita. Bonita was thirty or thirty-five miles from this trestle that had to be built. This timber was not hauled from the [639] vicinity of Bonita over to this cut. The road was built from west to east. I think the road met somewhere at Garrison and the golden spike was driven there in the summer of 1883. The railroad crossed the mountains, the Rocky Mountains, by means of a switch back. The main line was not constructed until some time afterwards. The Muklen Tunnel was not built and the main line road was not constructed, I think, for some eighteen months afterwards. The construction came in east and west, but a great deal of the stuff was taken from the canyon for the construction of the tunnel and the road lead-

(Testimony of A. B. Hammond.)

ing up to the tunnel, that was after the road was joined together, after this temporary road was built over the Rocky Mountains. I don't think the completion of the road in 1883, when it was joined at Cole Creek, was regarded as the real completion. They operated that switch back for some considerable time before the tunnel was completed. This Haycock Mill—there were three Haycock mills established in this Hellgate country. The first one established was, I think, in 1881, between Bonita and McCarty's bridge. It was a small portable mill. They were all small portable mills. When I say a small portable mill, I mean it was a smaller mill than that which was eventually run and operated by Fred Hammond and Fenwick on section 14-11-16. I do not suppose that the Haycock Mill had a capacity of over eight or ten thousand a day. It ran there probably six months. I do not know whether it ran continuously every day. It had a small contract and it took out the timber around it and then moved away. It was not an extensive mill and did not carry on any operations nearly as large as the Bonita Mill did. It was a small mill. [640] It is a fact that the other mills I mentioned in the Blackfoot country or in the Bitter Root country were small portable mills that cut out around the stand. I think one of those mills was called the Haycock mill and there was a mill down west of Missoula at Turah, also called the Haycock Mill.

Q. None of these small mills that we are talking about had anywhere near the capacity of either the Bonner Mill or the Bonita Mill?

(Testimony of A. B. Hammond.)

A. No—the Bonner Mill was a large mill.

(Witness Continuing:) The Bonita Mill was not a large mill. It was a portable mill. It was larger than the Haycock Mills. The Haycock mills had a capacity of probably eight or ten thousand feet, and I suppose the Bonita Mill had a capacity of fifteen thousand feet a day. I never estimated its cut. By a portable mill is intended a mill that can be hauled away with a wagon and which seeks the lumber rather than having the lumber brought to it from a distance. It seeks thickly timbered districts. The Bonner Mill was a large permanent plant. Indirectly I am a stockholder yet in the Missoula Mercantile Company, that is to say, I own stock in a company that owns stock in the Missoula Mercantile Company. I continued personally to own stock directly in the Missoula Mercantile Company until, I think, three or four years ago. The closing out of my affairs in the State of Montana and cessation of my personal supervision of business up there, came about gradually. Since 1888 I have not been actively in any business in Montana. I disposed of my residence in Missoula at that time, and I have not attended to the details of any business since that in that State. I have been a stockholder in the Missoula Mercantile Company ever [641] since it has been organized I have not been a director of the Missoula Mercantile Company for several years. I was a director in the Missoula Mercantile Company up until probably 1895. I would not be sure just now.

Q. How much did you ultimately realize from the

(Testimony of A. B. Hammond.)

sale of your interest in the Blackfoot Milling and Manufacturing Company, the Big Blackfoot Milling Company, the Montana Improvement Company and the Missoula Mercantile Company?

To which question defendant objected, on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it is an incompetent inquiry as to the private affairs of a citizen upon cross-examination, which amounts to an inquisition, as against which he is guaranteed under the Federal Constitution; which said objection was overruled by the Court, to which ruling of the Court defendant then and there duly excepted.

Defendant's Exception No. 16.

A. Well, so far as the Montana Improvement Company is concerned, I came out at the little end of the horn. I never got anything out of it. I lost what I put in. The Blackfoot Milling and Manufacturing Company was a transfer of stock. I received stock in the Big Blackfoot Milling Company; that was really in effect a transfer of the Blackfoot Milling and Manufacturing Company to the Big Blackfoot Milling Company, and I received stock in that transfer.

Q. From the Big Blackfoot Milling Company, how much did you ultimately receive out of it?

To which question defendant objected, on the ground that it was irrelevant, incompetent, and immaterial and not cross-examination, and that it is an incompetent inquiry as to the private affairs of a citizen upon cross-examination [642] which

(Testimony of A. B. Hammond.)

amounts to an inquisition, as against which he is guaranteed under the Federal Constitution; which said objection was overruled by the Court, to which ruling of the Court defendant then and there duly excepted.

Defendant's Exception No. 17.

A. I got my *pro rata* out of the sale of the Big Blackfoot Milling Company. I could not say off-hand what it amounted to, but I think it was as much as my brother got.

Q. Now, the Missoula Mercantile Company, how much did you ultimately receive from that?

A. I have never disposed of my interest in the Missoula Mercantile Company directly. I have taken stock in another corporation.

Q. What was the value of your stock when you transferred your interest in the Missoula Mercantile Company?

To which question defendant objected, on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it is an incompetent inquiry as to the private affairs of a citizen upon cross-examination, which amounts to an inquisition, as against which he is guaranteed under the Federal Constitution; which said objection was overruled by the Court, to which ruling of the Court defendant then and there duly excepted.

Defendant's Exception No. 18.

Mr. HALL.—I am trying to find out what he derived from his interest in the Missoula Mercantile Company.

(Testimony of A. B. Hammond.)

A. That is a matter of opinion. My interest did not increase very much. I got 6% dividends on my stock in the Missoula Mercantile Company. I took stock in another corporation. [643]

The COURT.—You did not sell it for cash?

A. No, sir.

Q. What is your estimate of its value at the time of your disposition of it?

To which question defendant objected, on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it is an incompetent inquiry as to the private affairs of a citizen upon cross-examination, which amounted to an inquisition, as against which he is guaranteed under the Federal Constitution; which said objection was overruled by the Court, to which ruling of the Court defendant then and there duly excepted.

Defendant's Exception No. 19.

A. I do not consider that it depreciated any. It was worth as much as it was originally worth, if not more.

Q. Can't you give it to me in dollars and cents, so we can get it into the record?

To which question defendant objected, on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it is an incompetent inquiry as to the private affairs of a citizen upon cross-examination, which amounts to an inquisition, as against which he is guaranteed under the Federal Constitution; which said objection was overruled by the Court; to which ruling of

(Testimony of A. B. Hammond.)

the Court defendant then and there duly excepted.

Defendant's Exception No. 20.

A. I should judge it was worth at least two hundred and fifty or three hundred thousand dollars.

Redirect Examination.

Thereupon defendant handed to the witness a certain document thereafter marked Defendant's Exhibit "R," and requested the witness to state whether or not that was the contract [644] between the Montana Improvement Company and the Northern Pacific Railroad Company to which he had referred in his cross-examination; to which question the witness replied that it was the original contract.

Defendant thereupon offered and read in evidence the said document and the same was thereupon marked Defendant's Exhibit "R," which said contract is in the words and figures following, to wit: [645]

[Defendant's Exhibit "R"—Agreement, Dated July 2, 1883, Northern Pacific R. R. Co.—Montana Improvement Co., Ltd.]

This agreement made and entered into this second day of July, eighteen hundred and eighty-three, by and between the Northern Pacific Railroad Company, a corporation created and existing by and under Act of the Congress of the United States entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by

the Northern route," approved July 12, 1864, and the Acts and resolutions amendatory thereof and supplementary thereto, party of the first part, and the Montana Improvement Company (Limited), party of the second part,

WITNESSETH, that for and in consideration of the covenants and agreements of the said Improvement Company herein contained, the said Railroad Company hereby grants unto the said Improvement Company the right to enter upon all the timber lands belonging to the said railroad company in the Territories of Montana and Idaho, granted to it by the said act of Congress to aid in the construction of *it* railroad, contained between North & South lines running respectively through a point on said railroad known as "McCarty's Bridge" on the Hellgate River, in Montana Territory, and through Sand Point, in Idaho Territory, and so situated that the timber thereon can be conveniently and economically brought or taken to mills on or near the said railroad, or on the Clark's Fork River or Lake Pend d'Oreille, and any timber lands further east than McCarty's bridge belonging to the said Railroad Company granted as aforesaid, situate on or convenient to streams running into Lake Pend d'Oreille; excepting & reserving such of said lands as are or shall be within the right of way of said railroad or of any branch or other railroad now, or hereafter to be operated by the said railroad company, or that may be occupied or used, or [646] required to be occupied or used, in connection with the operation of any of said railroads, and also excepting and

reserving any parcel or parcels of said lands in the immediate vicinity of any of said Railroads, which at any time the said railroad may desire to have preserved and shall designate, from time to time, to the said improvement company, and to cut and remove from said lands all merchantable timber thereon suitable to be manufactured into timber, but only in the manner, for the purposes and subject to the limitations and conditions herein mentioned and provided.

The right hereby granted to enter upon or to cut or remove any timber from said lands, or any of them, shall not extend beyond the period of twenty years from the day of the date of this agreement.

And the said Railroad Company hereby agrees to transport, at reasonable charges, when and where it can be done without interfering with the other business of the railroad, logs & timber cut on said lands & delivered by the said improvement company on board the cars or flats of the said railroad company to the mills on the line of the said railroad erected, or owned, or operated by the said improvement company; to furnish the necessary sidings for shipping the lumber that shall be manufactured by the said improvement company as it will at the same time, give to any other shipper in like condition as to location & facilities, & sufficiently low to allow the said improvement company a reasonable profit on its business of manufacturing & selling lumber & the other products of said timber; & to furnish suitable facilities; as far as reasonably practicable for loading & unloading on the railroad tracks, the

lumber & other products of said timber manufactured by the said improvement Company at all important Towns & Villages along the line of said railroad [647] in Montana & Idaho, where the said improvement company can establish a profitable trade.

And the said Railroad Company further agrees, that it will not give to any other persons, or body or bodies corporate, any lower rates, or greater facilities, for the transportation of lumber that it gives to the said Improvement Company; that it will forthwith withdraw all its timber lands from sale on or adjacent to its said railroad, & on or adjacent to the rivers, lakes & streams aforesaid, & will not sell any part thereof containing timber suitable for the purposes of this agreement, without the consent of the improvement Company so long as the right hereby granted remains in force & effect except such portions thereof as other persons now have thereto *a* equitable claim & will furnish; that if the said improvement Company with the fuel, cross-ties, piling, bridge-timber & lumber necessary for the use of its railroad, at reasonable & satisfactory prices, & as low as the same can be purchased from any other parties it will purchase & take said fuel, ties & piling, timbers & lumber from the said improvement Company so far as it can be conveniently used on that part of the railroad contiguous to the said timber lands.

The said improvement Company for & in consideration of the premise does hereby covenant and

agree, to & with the said railroad company, that it, the improvement Company, in payment for the said timber to & removed by it from said lands within the said period of 20 years, or during the time this agreement shall remain in force, shall, & will, forthwith, issue to the said railroad company, ten thousand & one full paid shares of the capital stock of the said improvement company, amounting at their par value to one million & one hundred dollars & will make & deliver the certificate, or certificates therefor, in the [648] manner of & to the said railroad company or to such other person or persons as it shall designate & appoint; which said shares shall not be liable to assessment, or further call, nor for any further payments under the provisions of Section 255, of chapter 15, entitled "Corporations," of the Revised Statute of Montana.

That it, the said improvement company, shall, without delay, erect or purchase the necessary mills for the manufacture of lumber dimention stuff, & other timbers, cross-ties, & such materials & products as the market demands, & the said railroad company shall require for its own use; & that it shall and will conduct its business of logging, lumbering, & manufacturing, & selling its product with diligence, economy & dispatch; & shall & will convert the merchantable timber on said lands into such lumber & materials as the said railroad company shall require for use in the operation & maintenance of its said & the residue into such lumber & products or will supply the demands of the market for building, agricultural, mining, or domestic purposes in the said

Territories of Montana & Idaho, & as fast as shall be required to meet such demands that it will not cut or suffer or permit to be cut, upon any of said lands, any timber or undergrowth of any kind less than eight inches in diameter, that it will not cut, or suffer or permit to be cut any of said merchantable timber into full or cross-ties, except as the railroad company shall require the same to be done; but it will convert the tops & limbs of all trees cut, into cross-ties & fuel & shall pile & burn the brush & refuse in such manner as to prevent the spread of fires and to suppress any that may be started, so as to protect the said timber lands, & all lands adjacent thereto from fires, so far as practible, & that none of said timber, or any [649] of the manufactures or products thereof, shall be exported to any point or place outside of the said Territories of Montana & Idaho, or be disposed of, in any manner, except for the uses & purposes hereinbefore mentioned.

And the said improvement company further undertakes & agrees that to the extent of the \$999,900 of capital stock which will remain to it after the issue & delivery to the said railroad company of the stock hereinbefore provided to be so delivered it will supply all the capital that may be required to erect & construct or purchase mills, booms, piers, docks, yards, tugboats & other necessary facilities, from time to time, as the demands may require & to repair the same, & to purchase the necessary articles & materials required for conducting the business of manufacturing, transporting & selling its

products aforesaid & for the purpose of purchasing any Government or other timber lands which shall be deemed to be for the benefit & interest of the said party of the second part.

The said improvement company agrees to erect & construct all necessary saw-mills, planing-mills, lath-mills, shingle-mills, drying-houses, piers, docks, booms & other improvements, & to furnish suitable & sufficient boats for towing, & barges & other craft necessary for the transportation of said lumber & products, & to furnish all the machinery necessary for the manufactured lumber to the extent demanded by the market, to be supplied thereby; & shall on proper notice, furnish said party of the first part with all the fuel, cross-ties, piling & bridge-timber, that it may desire for its road & branches thereof, or feeders thereto, at reasonable rates, & as low as the same can be procured of other parties; but the said railroad company reserves the right to purchase cross-ties, piling, & fuel, or any other material [650] except sawed lumber, from other parties if it shall so desire, & if lower prices are given than the said improvement Company is willing to sell for.

And the said improvement Company agrees that it will not cut more timber or lumber, than the market to be supplied thereby reasonably requires; & in order that the supply of lumber may be husbanded to meet the natural requirements of the business for future years, the said improvement company agrees that at the request of the said railroad company it will, from time to time, reduce the amount of production, if the said railroad company shall, at any

time, consider the market overstocked.

That for the purpose of preventing trespassers upon the public domain of timber over large areas, each party to this agreement will do all things lawful & proper to be done by it, to confine such trespassers as much as possible to supplying the actual wants of settlers along the line of said railroads for building, agricultural, mining or domestic purposes.

And the said improvement Company agrees that it will not furnish cross-ties, other railroad timber or lumber, to any railroad company, except the party of the first part, unless the said party of the first part shall consent thereto.

The said improvement Company, in consideration of the agreement of the said railroad Company to furnish the facilities hereinbefore mentioned, at the important towns & villages along the line of its railroad in the Territories of Montana & Idaho, as hereinbefore specified & of its other agreements herein contained, does hereby covenant and agree to & with the said railroad company that it, the said improvement Company, shall & will pay to the said railroad Company two dollars per thousand feet, board measure, mill scale, upon all the merchantable timber that shall be manufactured by the said improvement Company into [651] lumber, or other saleable products, the accounts of the same shall be rendered & said payments made by the said improvement Company to the said Railroad Company at the expiration of every three months, or oftener, if so required by the said railroad company.

It is furthermore stipulated between the parties

hereto, that if the said railroad company shall deem it advisable & for its best interests so to do, it may erect mills, & cut, manufacture & remove from said lands, or any of them, such lumber, timber, & material as it may need for its own use upon the railroad belonging to the railroad company, or upon any other railroad it may desire to furnish therewith.

It is hereby mutually covenanted and agreed by & between the parties hereto, that this agreement shall remain in force for the period of 20 years; but if the said improvement Company shall at any time fail to keep, perform or fulfill any of its stipulations, covenants or agreements herein contained, or shall without the written consent of the President of the said railroad company first obtained, assign or transfer this agreement, or any interest therein, the subject matter thereof, then in any such case, all rights & privileges hereby granted to it, shall wholly cease & terminate, & further that at the expiration of this agreement whether by lapse of time or *or* upon failure or default of the said improvement company, as aforesaid, the said improvement Company shall have the right, within a reasonable time, not exceeding six months, to remove from said lands any mills, buildings, or other structures, except docks, wharves, or piers, it may have erected thereon under the provisions hereof.

And it is hereby covenanted & agreed by & between the said parties that for speedy settlement of any questions or matters of difference that shall arise touching the true meaning or anything [652] herein contained or the performance or nonper-

formance thereof, on the part of either party & in respect of which the said parties fail to agree, the same shall be submitted to the arbitration & award of three competent & disinterested arbitrators, one of whom shall select the third & the award of the said arbitrators, or any two of them, shall be binding & conclusive upon the parties hereto, in respect of the questions or matters so submitted to arbitration.

In testimony whereof the said parties have caused their respective corporate seals to be hereunto affixed & these presents to be signed by their respective Presidents, the day & year first hereinbefore written.

NORTHERN PACIFIC RAILROAD
COMPANY,

Signed By H. VILLARD,
President.

Signed Attest. SAM C. WILKINSON,
Secretary.

MONTANA IMPROVEMENT COMPANY.

Signed E. L. BONNER,
President.

Signed Attest. J. A. ROBERTSON,
Secretary.

(Testimony of A. B. Hammond.)

[Indorsed]: 100,486.

Recd. G. L. O.

Oct. 9, 1885.

Copy of contract between
N. P. R. R. Co. and the
Montana Improvement Co.

	Department			
	of the		Received	
	Interior.			
	L. & R. R. Div.		Dec. 14, 1885.	[653]

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Recross-examination.

That is the contract that caused us to go out of business. I think the stock in the Montana Improvement Company was issued to the railroad company under that contract, but it was not delivered. I am not sure about that. I don't think it ever passed into the hands of the railroad company. I was not the secretary or the president. The contract was entered into in 1883—on the date it bears. The contract was arranged at the time of the incorporation of the Montana Improvement Company. The Montana Improvement Company was incorporated but it did not operate and the Northern Pacific people talked about the contract and it was finally gotten up about the time the Montana Improvement Company commenced to operate. It was gotten up in New York. The Northern Pacific people got that up and Mr. Bonner approved it and it was then that

(Testimony of A. B. Hammond.)

the Montana Improvement Company proceeded to look around and get ready to commence business.

The COURT.—That is when you met the objection—

A. Shortly after that, I don't think we were in operation a year before and we heard that the Land Commissioner objected to the operation of the Montana Improvement Company under that contract.

(Witness Continuing:) We did in fact operate under that contract and cut timber in the manner designated by it. After we got to operating, we did so under that contract.

Redirect Examination.

We did not abandon that contract until after this meeting in July, 1885, when we decided to liquidate.
[654]

[Testimony of W. H. Hammond, for Defendant
(Recalled—Cross-examination).]

W. H. HAMMOND, a witness called and sworn on behalf of the defendant, was thereupon recalled for further cross-examination:

Mr. HALL.—You testified on your direct examination that Mr. Boyd cut in section 22, township 14 north, range 14 west. In whom was the title to the lands in section 22, particularly known as the Silvey claims, at the time Mr. Boyd cut there?

A. Silvey.

Mr. WHEELER.—That is objected to as irrelevant, incompetent and immaterial and not cross-examination. The Government has dismissed as to the

(Testimony of George W. Fenwick.)

Silvey claims; therefore, it is no longer of any consequence to us.

Mr. HALL.—The proposition that I want to prove is, that Mr. Boyd was the contractor who did the work of cutting these logs for the Big Blackfoot Milling Company and at that time he cut over the line on the east half of the northeast quarter of section 22.

Mr. WHEELER.—We will admit that Mr. Boyd had a contract for the cutting of logs on adjoining land, but that he had no contract to cut logs on the particular eighty where he cut over the line—that he had no contract with the Big Blackfoot Milling Company to cut on other lands than those embraced within the Silvey claims.

Mr. HALL.—That is all.

Mr. WHEELER.—That is all.

**[Testimony of George W. Fenwick, for Defendant
(Recalled—Cross-examination).]**

GEORGE W. FENWICK, a witness called and sworn on behalf of the defendant, was thereupon recalled for further cross-examination, and testified as follows:

I was born in New Brunswick, Canada. As to when I was naturalized in the United States—I took out my final [655] papers the 15th day of October, 1894, in Missoula County, Montana, before Judge Witter. I took out my first papers in May, 1886. I do not know what date in May, 1886, I took out my first papers. I have my final papers here, otherwise I would not know the date when I took them out. I

(Testimony of George W. Fenwick.)

am positive I took out my first papers in the spring of 1886. It might be April, May or June, of 1886, but I think it was May, 1886. My recollection is it was a little before or about the same time that I went to Bonita.

Thereupon the defendant rested. [656]

Stipulation [Re Record of General Land Office on Homestead Entry of Henry F. Edgar, etc.].

Mr. HALL.—We desire to offer in evidence the records of the General Land Office showing why the homestead entry of Henry F. Edgar was cancelled by the Department of the Interior.

Thereupon a discussion ensued between counsel for each side and the Court concerning the admissibility in evidence of said records, it appearing that there was much hearsay and immaterial matter contained therein, and it was finally agreed between the parties that the reason for the cancellation of said homestead entry of Henry F. Edgar by the Department of the Interior might be stated by the Court to the Jury, to be as follows:

The COURT.—(Addressing the Jury.) The entry was cancelled by reason of the conclusion that it was not made in good faith, based upon the report of a Special Agent; such conclusion was reached by the Acting Commissioner of the General Land Office. Such conclusion was reached at a hearing at which Edgar was cited to appear but did not appear.

[Testimony of George B. Archibald, for Plaintiff (in Rebuttal).]

GEORGE B. ARCHIBALD, a witness called and sworn on behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination.

I am mineral inspector for the General Land Office. I was educated at Butte, Montana, in the State School of Mines. I took a four-year course, and graduated with the degree of Mining Engineering in 1905. Since I graduated I have been mining engineer, working principally as mineral inspector for the Land Office. I have been engaged as such mineral inspector, [657] in the active inspection of mineral lands for the United States Government, since May, 1909. I have had experience as a practical miner to the extent that while I was going to school, I really practiced mining during vacations, and since then continuously, more or less. I made an examination of the lands in townships 11 north, ranges 15 and 16 west, in the State of Montana, for the purpose of determining the mineral character of the lands. In those two townships I made an examination of the following tracts of land: In township 11 north, range 16 west, I examined section 2; the north half of the northwest quarter of section 10; and the northwest quarter of the northeast quarter of section 10; the east half of the southeast quarter of section 12; the southwest quarter of the southeast quarter of section 10; all of section 12; all of section 14. In township 11 north, range 15 west, I

(Testimony of George B. Archibald.)

examined section 6, section 8, section 18, section 20, section 22 and section 26. At the time of my examination I made notes in the field covering my work.

Q. You may state the examination you made of each section separately and what you found upon it and your conclusion as to the mineral or non-mineral character of the ground.

To which question defendant objected on the ground that it was irrelevant, incompetent and immaterial and not rebuttal.

Thereupon the Court overruled the said objection of defendant, to which said ruling defendant excepted.

Defendant's Exception No. 21.

Starting in with section 10, township 11 north, range 16 west, as to the north half of the northwest quarter and the northwest quarter of the northeast quarter, I found that [658] most all of those three forties were sandstone, with a little lime in the extreme northeast quarter, and there was no excavation of any nature there, absolutely nothing to indicate the land having any value for mineral purposes. The formation dipped to the southwest, and as I said, there was no excavation of any kind, nor anything to indicate the mineral character. The sandstone is not mineralized. Then take the south half of the southeast quarter of section 10 and the northeast quarter of the southeast quarter of section 10, the same township and range, I found that the northeast quarter of the southeast quarter was entirely under-

(Testimony of George B. Archibald.)

lain with sandstone, and in the southeast quarter of the southeast quarter, practically the whole forty was covered with diabase. Diabase is an igneous rock, consisting of plagioclase and feldspar. It may contain minerals. That rock in this particular place did not contain minerals. In the other forty, that was underlain mostly with valley alluvium, and the formation in places does not show for that reason.

Q. I wish you would state whether or not you found any minerals or whether the rock is of such a character as usually bears minerals.

Same objection, ruling and exception as Defendant's Exception No. 21.

Defendant's Exception No. 22.

A. The only possible place in any of this ground that I have described was over in section 10 where I would expect to find any mineral and that would be in the diabase. For that reason we examined that very thoroughly and found several broken, fractured zones. I went so far as to have assays made of that rock and got absolutely nothing from it.

Q. Go on to the next tract. [659]

Same objection, ruling and exception as Defendant's Exception No. 21.

Defendant's Exception No. 23.

A. Section 2, township 11 north, range 16 west is underlain almost entirely with sandstone, barren of any mineral values, with a little lime, and along the south side the limestone is great and massive and has no value at all. There is no excavation of any kind

(Testimony of George B. Archibald.)

and the formation is not exposed owing to its being covered with surface detritus gravel, and so on. Going to section 14-11-16, the north half of section 14 contains a little granite in the northeast quarter of the northeast quarter and also a little granite in the southeast quarter of the southeast quarter and the rest of the section is alluvium and sandstone. Over in the northeast quarter of the northwest quarter the same diabase is shown as in said section 10 and also extends down here part way over this forty, and was examined very carefully and could not see any indication of any mineralization at all. None of these formations contained any mineral and there was no excavations of any nature to show it up at all. I had to rely mostly on an examination of the exposed formation where it occurred naturally. The south half of section 14-11-16 was all sandstone and not mineral bearing at all. No exposures, no kind of excavation of any kind and only poor exposures of the formations in places; lots of surface wash was on it. Then section 12 in this same township, the north half is all sandstone and a little quadrant formation. By quadrant formation, I mean a separate formation with iron in it, but it looks like it was barren rock. It has a lot of iron in it. The formation is a sedimentary formation. The balance of the section, all in the extreme southwest quarter, there [660] is granite that cuts across the corner and the balance of the section is underlaid by alluvium and you cannot see the formation in places at all. There is a little point of granite also in the southwest quar-

(Testimony of George B. Archibald.)

ter of the southwest quarter that covers several acres, but it does not show any mineral bearing veins or any veins at all, for that matter.

Q. Did you take any samples for assay purposes from that section?

Same objection, ruling and exception as Defendant's Exception No. 21.

Defendant's Exception No. 24.

A. Yes, in the southwest quarter of the southwest quarter there was a shattered zone of broken material along the railroad track running north and south and in places there was a little iron stain, and thinking that it might possibly contain a little mineral, and in order to be absolutely sure, I took a sample, but did not get any report at all from it. In section 8, 11 north, 15 west, that is practically all sandstone and quadrant formation and a little lime streak; lime cuts through the middle of the section running northwest and southeast. There are no openings of any kind or nature there and we had to rely solely on the natural exposure of the formation in places. I could not find any mineral indications at all there. In section 18-11-15, there is the same alluvium along the river bottom and sandstones on the northwest of the northeast quarter and also in the southwest quarter; there is some granite and dacite shows in this section. Dacite does not contain any mineral. I do not ever expect to find mineral in dacite. There is also a diabase dike across the southwest quarter, but it does not show any mineral at all. Section 6-11-15 it is practically, mostly all, sand-

(Testimony of George B. Archibald.)

stone with [661] some lime in the northwest quarter of the northeast quarter cutting across the northeast quarter, striking lime in the southwest quarter and some quadrant formation in the extreme southwest. There are no workings of any kind on this section. We had to rely entirely on the exposure of the formation in places. We found absolutely no indication of mineral. On section 20-11-15, it is mostly all sandstone and also shows some granite and dacite. Section 22-11-15 on the south half is all sandstone and a diabase dike crosses through the middle of the section easterly and westerly; there is sandstone in the north half and alluvium along the river bottom and a little dacite up in the extreme northeast forty. There is no indication of mineral at all. Section 26-11-15, the main part of the section is sandstone, some gracite detritus in the south half of the section, the extreme south half, coming down from the mountains and in the northeast quarter of the northeast quarter is practically all diabase. That is where we found considerable working—considerable work had been done up there, a number of tunnels run and some showing of copper rocks found there. That was the only place on the whole ground covered where there was any real mineral indication.

(Witness Continuing:) As to the extent of my examination of this section 26-11-15, that I have just testified to, it was such that I was only over it about three-quarters of a day. One of the men had examined it more completely. I did not devote so much time to it. I took samples from there and had

(Testimony of George B. Archibald.)

them assayed. I turned them over to Mr. Goodall, the assayer,—three samples altogether. One sample was taken from the tunnel which strikes northerly and southerly and shows a very poorly defined vein. The vein matter was a kind of altered [662] country rock and the walls were not well defined; it seemed to dip a little bit to the west, and the best looking stringer in there was about a foot wide. I took a sample from this foot of the best looking material. It showed a little quartz, and by the way, that is the only place that I found any quartz on any of the land—that was in this forty. No quartz was on any of the other ground. This is section 26-11-15. It also showed a little iron pyrites and probably a little chalcopyrites. There appeared to be chalcopyrites, although the assay did not bear it out. The general contour of the ground in this northeast quarter of the northeast quarter of section 26 comprised a gulch running down through the middle forty northerly and southerly.

Q. Did you see any indication of timber having been on that particular forty acres of land?

A. Yes, I noticed some timber on the forty.

Cross-examination.

The granite and diabase are the only two rocks that I have mentioned that carried gold. I say that I found quartz on section 26-11-15. The lime that I speak of was what is called Madison limestone. That is not the kind of limestone from which cement is manufactured. It is the kind of limestone that

(Testimony of George B. Archibald.)

is found in the vicinity of gold diggings and mines. Being an expert, I can tell the general kinds of rock by looking at them. Of course, there are finer distinctions that I would have to use a microscope on. My education and experience is supposed to make me expert beyond an ordinary miner; and I have known of a good many miners who go around looking for gold in places where I, as a student and an experienced man, would never think of looking for it; but I don't think you would [663] call them good miners. Nevertheless, I would call them prospectors. Take a miner who has had any experience at all, and he knows the country pretty well and just what formations are likely to contain gold, but in a new camp there are lots of prospectors that have not such an experience. My reason in having these assays made was because I wanted to be accurate. I was satisfied in my own mind that the rock did not carry any gold, but I wanted to be positive about it. I simply did that as a precaution. I was perfectly satisfied in my own mind that it did not contain anything. I never knew of places like that that carried gold. I found iron pyrites. It is sulphide of iron, kind of yellowish, and it looks something like gold. Real miners have never mistaken iron pyrites for gold. I suppose it is very rare that iron pyrites will look so much like gold that you cannot tell it. I have known of instances where iron pyrites did carry gold—it is very rare that it does. The iron pyrites in this case was disseminated through the diabase. The iron pyrites was in very fine specks that were

(Testimony of George B. Archibald.)

difficult to see. It is not the ordinary kind of iron pyrites that carries gold at all. I don't know of any case that iron pyrites of this character carries gold. There is a small amount of gold in iron pyrites, but the small amount of iron pyrites that was in this rock would not contain gold of any value at all. These assay samples were taken from the underground workings out of a tunnel. In my experience I have known of quartz to show pay, and then a little farther on, five or ten feet, not to show it. That is not an infrequent occurrence. In fact, it is customary to find gold in chutes. As to this particular country, I did not know a great deal about its history and as to whether or not there have been any mines within a few miles of this particular section 26 that I am talking about. I was up to the quartz [664] mine one summer. I spent a vacation there in 1902. I was never up at Bearmouth. I have been up to Gold Creek. I know the reputation of the Bearmouth mines, which is of their having been great producers. I don't recollect how much was supposed to have been taken out of there. There are no indications of this country having been prospected at all in times gone by. It is my experience that a great many men, in going over country of that kind, pick up the flat or the loose croppings. They usually follow the float up until they find where the ledge is and then they will work it, if the float looks good. A prospector will go along a country and simply do a little picking here and there looking at the float. It does not mean anything to him until he

(Testimony of George B. Archibald.)

finds the ledge and then he may have a good mine. He is always looking for the vein. As a rule, the prospector has to pick off the surface ground a little bit, otherwise, there will be a poor exposure. After twenty-five or thirty years, prospect work that a miner might have done in that way, would not be disclosed by a superficial examination. I think that any prospector would leave some kind of a hole that you could see. As a student and an experienced mining man, I have known of prospectors passing over land that subsequently developed into very valuable mineral land.

Redirect Examination.

The Bearmouth mines would probably be four or five miles from section 26-11-15, if not more. I examined the country up there around the Quigley mine and did some surveying. I was there for about two months altogether. The mine was a rank failure. They never had anything there at all. I know there was some little prospects around Quigley. I don't know what is there now. I have not been there since 1902. I imagine [665] the Quigley mine is at least about fifteen miles from Bonita, on section 10-11-16.

[Testimony of Oscar J. Reynolds, for Plaintiff (in Rebuttal).]

OSCAR J. REYNOLDS, a witness called, sworn and examined on behalf of the plaintiff in rebuttal, testified as follows:

(Testimony of Oscar J. Reynolds.)

Direct Examination.

I reside at Helena, Montana. By occupation I am a mining engineer. I received a scientific education in mining engineering, studying one year at Golden, Colorado, and three years at the University of California, where I pursued a special course in mining engineering. I did not graduate from the University of California. If I had completed the course I would have been Bachelor of Science. I have engaged in mining since I left the University, in the States of Montana, Idaho, Oregon, California and Mexico. I examined the lands in townships 11 north, ranges 15 and 16 west, in the state of Montana, to ascertain the mineral or non-mineral character. I made this examination during the fall of 1911.

Q. Please state as rapidly as you can the examination you made of each particular tract; what you discovered there and what your conclusion is as to the mineral or non-mineral character.

Same objection, ruling and exception as Defendant's Exception No. 21.

Defendant's Exception No. 25.

A. Section 10, township 11 north, range 16 west, north half of northwest quarter and northwest quarter of northeast quarter, I found those forties to be underlain by a sedimentary formation. The lower portion was alluvium. On all of section 2 in township 11 north, range 16 west, the greater portion of this was underlain by a sedimentary—it was all sedimentary [666] and a few patches on the lower part was alluvium. In section 10, township 11

(Testimony of Oscar J. Reynolds.)

north, range 16 west, the south half of the southeast quarter and the northeast quarter of the southeast quarter, there was a sedimentary formation, igneous and alluvium. On the southwest quarter of the southwest quarter of section 10, township 11 north, range 16 west, the igneous rock there showed a fractured zone, running northerly and southerly, in which there was some iron stains, but could hardly be considered to be mineral in character.

Q. What was the next section you examined?

Same objection, ruling and exception as Defendant's Exception No. 21.

Defendant's Exception No. 26.

A. Section 14, township 11 north, range 16 west. This section was underlain by igneous rock and alluvium for the most part.

Q. Did you find any indications of mineral on said section 14?

Same objection, ruling and exception as Defendant's Exception No. 21.

Defendant's Exception No. 27.

A. No, sir, I did not.

Q. What was the next section you examined?

Same objection, ruling and exception as Defendant's Exception No. 21.

Defendant's Exception No. 28.

A. Section 12, township 11 north, range 16 west. This was underlain by sedimentary and igneous rock and alluvium along the river.

(Testimony of Oscar J. Reynolds.)

Q. Did you find any indication of mineral on that section?

Same objection, ruling and exception as Defendant's Exception No. 21.

Defendant's Exception No. 29. [667]

A. On the southwest quarter of the southwest quarter there was a fractured zone there in igneous material that showed iron stains, but I do not believe it would be considered mineral in character. I examined section 8, township 11 north, range 15 west.

Q. Did you find any indication of mineral in that section?

Same objection, ruling and exception as Defendant's Exception No. 21.

Defendant's Exception No. 30.

A. No, sir, I did not.

Q. Did you examine section 18, township 11 north, range 15 west?

Same objection, ruling and exception as Defendant's Exception No. 21.

Defendant's Exception No. 31.

A. I did and saw nothing there to indicate that it was mineral in character.

Q. Continue and state what other sections you examined and what was your conclusion as to their mineral or non-mineral character?

Same objection, ruling and exception as Defendant's Exception No. 21.

Defendant's Exception No. 32.

A. Section 6-11-15, I saw nothing there to indicate

(Testimony of Oscar J. Reynolds.)

that it was mineral in character; the next was section 20-11-15. I saw nothing there to indicate that it was mineral in character. The next is section 26-11-15; on the east half of the northeast quarter there was some workings and some fractured zones and faults and in one tunnel there I saw a vein of crushed country rock, very little quartz, and I saw a few particles of chalcopyrites and some pyrites of iron. [668]

(Witness Continuing:) I took samples of that and had it assayed by Herbert Goodall, at Helena, Montana. The sample I gave to Mr. Goodall was sample No. 3. I also gave sample No. 1 to Mr. Goodall from the northeast quarter of the northeast quarter of section 26-11-15; and sample No. 2 from the northeast quarter of the northeast quarter 11-15, I gave to Mr. Goodall.

Mr. WHEELER.—I will not object upon the ground that it is hearsay, if the witness testifies what those reports were.

Mr. HALL.—What were the reports on those samples?

Same objection, ruling and exception as Defendant's Exception No. 21.

Defendant's Exception No. 33.

A. Samples Nos. 1 and 2 showed no gold, no silver and no copper; sample No. 3 showed a trace of gold, no silver, and a trace of copper.

Q. Were those the samples that were taken out of this tunnel?

(Testimony of Oscar J. Reynolds.)

Same objection, ruling and exception as Defendant's Exception No. 21.

Defendant's Exception No. 34.

A. Sample No. 3 came from the tunnel, but samples Nos. 1 and 2 did not. They came from other places.

Q. What places did they come from?

Same objection, ruling and exception as Defendant's Exception No. 21.

Defendant's Exception No. 35.

A. Sample No. 1 was on the east side of a creek that flows north through the said northeast quarter of the northeast quarter, which was the best looking rock from a fractured zone in the diabase. It showed some oxide of iron was in some silicious material.
[669]

Q. Where was the other sample taken from?

Same objection, ruling and exception as Defendant's Exception No. 21.

Defendant's Exception No. 36.

A. Sample No. 2 was near that, but a little farther up the hill from No. 1.

Cross-examination.

This tunnel that I went into was about sixty-five feet long. Somebody apparently had been foolish enough to run in on that vein for sixty-five feet. I did not see any one hundred dollars worth of work that had been done by Mr. Wills on section 8-11-15. I did not see any work. I don't remember finding an open cut with about one hundred dollars worth of

(Testimony of Oscar J. Reynolds.)

work done in it. I don't remember of seeing opposite Bonita, where there had been a lot of placer mining done. I remember the place up the Hellgate River where a man by the name of Steele had spent several thousand dollars in building a flume and the flume seemed to run backwards after the water was put in. I did not take any samples from there. I did not do any panning there.

Redirect Examination.

I think that Steele flume was north of a section of land involved in this suit. My examination was confined to these sections in suit.

Recross-examination.

I examined some of the railroad sections to see whether they were mineralized or not in this immediate neighborhood adjacent to section 26-11-15.

[Testimony of J. D. Pardee, for Plaintiff (in Rebuttal).]

J. D. PARDEE, a witness called, sworn and examined on behalf of the plaintiff in rebuttal, testified as follows: [670]

Direct Examination.

I reside at Washington, D. C. I am geologist in the Geological Survey of the United States. I have been such since 1908.

Mr. WHEELER.—We will admit that the gentleman is qualified. Go right ahead.

(Witness Continuing:) I lived in the state of Montana until the time I entered the Government service in 1908. I was familiar with Bear Creek

(Testimony of J. D. Pardee.)

that empties into the Hellgate River. The mouth of Bear Creek is about five miles in a straight line east from section 26, in township 11 north, range 15 west. The mines on Bear Creek are about seven or eight miles in a straight line north of the mouth of the creek. The nearest mine on Bear Creek is about six or seven miles in a straight line from section 26-11-15. I first saw that stretch of country along the Hellgate River in townships 11 north, ranges 15 and 16 west, when I was a boy, as far back as 1886 or 1887. I did not know at that time of any mining operations that were being conducted in either one of those townships, but I have seen some attempts to mine there, namely, a place near Medicine Tree Hill, on the north side of the river. That was where Abernathy mined. There was a flume built there. I was there at the time the flume was being constructed preparatory to crushing the gravel. I went there after they shut down. At the time I visited it I remember we washed a few pans of gravel and we got such a small prospect that I concluded that it was no good. As to other mining operations in those two townships, I then heard of prospectors doing a little prospecting work up and down that general region, but I did not see any of it. This Abernathy work that I speak of was done, I think, about 1894 or 1895. I made [671] a specific examination of the lands embraced in these two townships the latter part of last October. In my examination I covered the area of these sections which have been named here, and the sections in between. In my examina-

(Testimony of J. D. Pardee.)

tion I found some indications of mineral in sections 26 and 23, in township 11 north, range 15 west. Outside of those sections, I did not find any minerals of value or any indications that there were any minerals of value.

Cross-examination.

I found some places where other men had been working. My recollection is that one or two very fine colors were produced in a pan or two of dirt at this mine that I refer to. It was so small that it seemed insignificant. I saw about three or four pans panned out. That was when the flume was being built, before the water had been turned in.

Redirect Examination.

The extent of my examination of section 26-11-15 was as follows: I examined the northeast corner pretty carefully where the mineral indications are to be found and I covered the rest of the section. It was the extreme northeast quarter of the northeast quarter that I examined and that is where I found indications of prospecting, and those indications extended over into section 23, to the northwest, and also into section 25. They did not extend over on to any other portion of section 26. The mineral indications were absent going to the southwest, that is, over the rest of the section. [672]

Wednesday, February 5, 1913.

**[Testimony of Dan Graham, for Plaintiff
(Recalled in Rebuttal).]**

DAN GRAHAM, a witness called and sworn on behalf of the plaintiff, was thereupon recalled by the plaintiff in rebuttal, and testified as follows:

Direct Examination.

I made a rescale of the east half of the northeast quarter of section 22, township 14 north, range 14 west. I made that rescale last December. At that time I observed the portion of the tract described that had been cut over. The cutting extended six hundred and sixty (660) feet from the quarter corner on the east line of section 22. I went around that forty-acre tract. The cutting extended from the southwest corner of the southeast quarter of the northeast quarter of said section, clear across that forty, namely, the said southeast quarter of the northeast quarter, and extended in some places on to the other forty, that is, the northeast quarter of the northeast quarter.

Cross-examination.

In the north half of this particular tract, that is, the northeast quarter of the northeast quarter of said section, there is very little timber taken off, but in the lower forty, that is, the southeast quarter of the northeast quarter, I estimated that about two-thirds of that forty acres had been cut off. The cutting runs in and out, a little ragged along there. All of the timber to the west and south of the tract had been

(Testimony of Dan Graham.)

cut. Section 26, to the east of section 22, was cut to quite an extent; but it was not cut on section 23.

Redirect Examination.

Two-thirds of the south forty was cut off and a very small portion of the north forty. [673]

Recross-examination.

Three hundred and twenty (320) feet on the south side of the north forty, probably somewhere about an acre all told, was cut. The two-thirds that I refer to in the south forty was all clean cutting. What was not cut clean was burned. [674]

[Stipulation Re Title to Land Described in Complaint, etc.].

It is stipulated and agreed by the parties hereto that there was a patented placer mining claim in section 23, township 11 north, range 15 west, on Tyler Gulch, and that it contains one hundred and fifty-nine (159) acres.

[Stipulation of Facts.]

Thereupon the following facts were stipulated and agreed to by and between the parties hereto:

It is hereby stipulated that during all the time mentioned in the complaint on file herein, the title to all of the lands described in the complaint, except such lands as are hereinafter particularly described, was in the United States, and the United States was the owner of the same:

NW. $\frac{1}{4}$, sec. 34, Twp. 14 N., R. 14 W. Pre-emption cash entry No. 4489, made by Elijah F. Cun-

ningham Apr. 1st, 1890, patented January 30th, 1892.

Lots 7, 8, 11, and 12, Sec. 18, Twp. 14 N., R. 15 W., in Pre-emption Cash Entry No. 4211, made by Wm. Tuchenhausen July 12, 1890, patented Nov. 3, 1891.

S. $\frac{1}{2}$ NW. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 28, Twp. 14 N., R. 16 W., in Pre-emption Cash Entry No. 565, made April 26, 1890, by Wm. H. Longley, patented Jan. 24, 1895.

N. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, sec. 28, Twp. 14 N., R. 16 W., entered as a Homestead No. 4943, Cash Certificate 564, by A. W. Merrick, March 28, 1891, patented May 11, 1894.

E. $\frac{1}{2}$ NW. $\frac{1}{4}$, and lots 1 and 2 of sec. 18, Twp. 13 N., R. 14 W., in Timber and Stone Cash Entry No. 5498, made by John Kelly, Aug. 24, 1894, patented May 11, 1895.

E. $\frac{1}{2}$ NE. $\frac{1}{4}$ of sec. 22, Twp. 14 N., R. 14 W., in Timber and Stone Cash Entry No. 7473, made by Peter Miller May 1, 1908, patented Jan. 21, 1909.

W. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, sec. 20, Twp. 14 N., R. 15 W., in Timber and Stone Cash Entry No. 379, made by Ernest R. Kilburn Oct. 29, 1892, patented July 19, 1893.

E. $\frac{1}{2}$ SE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, of sec. 20, Twp. 14 N., R. 15 W., in Timber and Stone Cash Entry No. 1179, made by Simon C. F. Cobban Aug. 31, 1899, patented June 28, 1900.

[675]

NE. $\frac{1}{4}$, Sec. 26, Twp. 14 N., R. 16 W., in Timber

and Stone Cash Entry No. 727, made by John P. Boileau Oct. 22, 1894, patented May 11, 1895. NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of sec. 28, Twp. 14 N., R. 16 W., in Timber and Stone Cash entry No. 1117, made by Anna A. Rowe Sept. 11, 1899, patented June 28, 1900.

It is further stipulated that the Government has no right to recover in this case for the value of the timber cut from any of the lands hereinbefore particularly described, after the date of settlement and filing the application to enter or purchase same respectively as hereinabove stated.

It is further stipulated and agreed that Township 11 North, Range 15 West, and Township 11 North, Range 16 West, Montana Principal Meridian, at all the times mentioned in the complaint herein and until May, 1902, were unsurveyed public lands of the United States with the exception of the following tracts of land in said Township last mentioned which were surveyed on the respective dates following, to wit:

That portion of sections 8, 9, 10 and 11 lying north of Hellgate River as it existed at the date of such survey to wit, July 17, 1874, and section 7 surveyed January 14, 1885. Provided, however, that this stipulation shall not be construed as either admitting or denying the existence of mining locations or patented mining claims in said townships or either of them, and proof of the existence thereof, if any, is not affected by this stipulation.

It is further stipulated that all of the lands described in the complaint herein are situated within

the forty-mile limits of the Northern Pacific Railroad grant.

T. H. SELVAGE,

FRANK HALL,

Attorneys for Plaintiff.

CHAS. S. WHEELER,

W. S. BURNETT,

Attorneys for Defendant. [676]

[Motion to Amend Complaint, etc.]

Thereupon plaintiff moved the Court for leave to amend the complaint on file herein on its face, by adding to the last line of the prayer of said complaint, the following: "And for interest thereon."

To the allowance of such amendment the defendant objected, which said objection was overruled by the Court, and to the overruling of which said objection the defendant excepted.

Defendant's Exception No. 39.

Thereupon argument was made to the Court and jury by counsel for plaintiff, and in the course of said argument, said counsel stated that after the introduction of all the evidence in the cause and making allowance for the eliminations noted during the introduction of said evidence, that plaintiff claimed defendant had cut or converted or was otherwise responsible for approximately sixteen million board feet of timber. [677]

Thursday, February 6, 1913.

Thereupon the respective counsel for the parties resumed their arguments to the Court and jury.

Friday, February 7, 1913.

Thereupon the respective counsel for the parties resumed their arguments to the Court and jury.

The above and foregoing testimony was all the testimony offered or received in the case.

[Instructions Requested by Defendant.]

That in accordance with the rules of this Court and prior to the close of the evidence hereinbefore set forth and before the making of any argument to the jury, defendant presented to the Court certain instructions, in writing, which he requested that the Court would give to the jury.

That the said instructions so requested by defendant were and are, respectively, in the words and figures and numbered as follows:

I.

The fact that the defendant happened to be a stockholder or an officer of a corporation, which corporation may have been guilty of conversion, does not, of itself, in the absence of his personal participation in such conversion, render him individually liable therefor.

II.

One does not become liable merely because he does not endeavor to prevent an act of conversion.

III.

In order to maintain this action, the plaintiff must prove that the timber in question was its property, and that while it was the property of the plaintiff it came into the possession of the defendant who converted it. If you find [678] that the defendant never came into possession of the timber, and never

purported to assume or assumed control over it, then your verdict must be for the defendant.

IV.

I instruct you that, even if you find that timber was converted, and that the proceeds derived from the sale of the same were paid over to the Missoula Mercantile Company in payment of debt, that this circumstance would not of itself render either the Missoula Mercantile Company, or any of its officers or stockholders, liable. Before the defendant Hammond can be held liable for conversion of such timber, he must have personally planned or have personally directed the cutting of the particular timber converted, or he must have dealt personally, or through agents personally directed by him, with the possession or disposition of such timber after it was cut.

V.

If you find that any of the timber, for the conversion of which this action is brought, belonged to the United States, and was converted by Henry Hammond, G. W. Fenwick, or Fred Hammond, the Montana Improvement Company, the Blackfoot Milling and Manufacturing Company, or the Big Blackfoot Milling Company, and that, pursuant to the instructions of said persons or corporations, or either of them, the purchase price which was received for such timber so converted was paid to any corporation in which the defendant was a stockholder or officer, yet, as matter of law, I instruct you that this does not entitle the plaintiff to maintain this action against the defendant, nor does this constitute a conversion.

by defendant of the plaintiff's property. [679]

VI.

I instruct you that the evidence offered in this case is not sufficient to justify the rendition of a verdict against the defendant in this action, and therefore I direct you that you return a verdict in favor of the defendant.

VII.

I instruct you that conversion consists in an act of wilful interference with any chattel without lawful justification, whereby the person entitled thereto is deprived of possession of it. The chattels for the conversion of which this action is brought consist of timber or lumber claimed to be owned by the United States, and if you find that the United States did own this timber or lumber, yet, as matter of law, if the defendant in this case did not interfere with the possession of the United States in or to the timber or lumber, for the conversion of which this action is brought, then your verdict must be for the defendant.

VIII.

The Court instructs the jury, as matter of law, that the burden of proof is upon the plaintiff to establish every element of its case, and it is for it to do this by a preponderance of the evidence; and if the jury find that the evidence bearing upon the plaintiff's case is evenly balanced, or that it preponderates in favor of the defendant, then the plaintiff cannot recover, and the jury will find for the defendant.

IX.

The burden of proof is on the plaintiff not only to

establish by a preponderance of the evidence that timber has been unlawfully taken from the lands involved in this controversy, or from some portion thereof, but it is also incumbent [680] upon the plaintiff to show, by a preponderance of the evidence, by whom the same was taken, and the quantity thereof, and I instruct you that, even if you should be satisfied from the evidence that timber had been unlawfully converted, and that the defendant was responsible therefor, nevertheless, if, from the evidence, you are unable to ascertain the quantity or extent of the timber taken, your verdict must be for the defendant, and, in this same connection, I instruct you that you are not permitted to guess at the quantity taken or to speculate as to the amount. You must, in such case, find a basis, in the preponderance of the evidence, for your computation in computing the amount of timber taken.

X.

A. B. Hammond appears to have been a director of the Big Blackfoot Milling Company, and a stockholder therein. It is admitted by the defendant here that one Boyd, while employed by the corporation, entered upon a certain eighty acres of land in section 22, township 14 north, range 14 west. Now, although this act may have been innocent, the corporation which employed Boyd would be responsible for the taking, even though it had given Boyd express directions to be careful and to keep within the lines of the property upon which the corporation had a right to cut, and even though it was entirely ignorant that Boyd had gone beyond those lines on to

property of the Government. But the question for you to decide is not whether the corporation would be responsible, but would A. B. Hammond be responsible, and, in such connection, I instruct you that A. B. Hammond would not be responsible unless he had personally participated in directing Boyd to cut this particular timber, or unless, after the timber was cut, he had personally participated in its possession, [681] sale, or disposition. Even a knowledge upon A. B. Hammond's part that Boyd was an employee of the corporation and was cutting timber for the corporation, would not of itself be sufficient to justify a verdict against the defendant. Before the defendant can be held liable for Boyd's cutting, the defendant must in some manner have actually participated in the unlawful act of Boyd.

XI.

If you believe from the evidence that Henry Hammond, during the period while the Edgar claim was cut, was the sole owner of the Bonner mill, and that the defendant did not participate in the cutting of the timber from said claim, or in the manufacture of it into lumber, or in the sale or disposition thereof, then I instruct you that the defendant would not be liable for the conversion of said timber.

XII.

If you find from the evidence that timber was cut from Lot 10, in section 18, by the Big Blackfoot Milling Company at a time when said corporation had a permit to cut over the adjoining property, and over a very large area of the public domain in addition thereto, and if you find that the said timber was cut

contrary to the directions of the said corporation, by some of its employees, then I instruct you that the said corporation nevertheless would be liable for the taking thereof. But again the question arises: Would the defendant, A. B. Hammond, a director and stockholder in the said corporation, be personally liable? The answer is that he would not be liable unless you find from the evidence that he personally participated in the taking of the said timber. If he knew nothing about the taking thereof, and took no [682] personal part therein, he would not be liable, although the corporation in which he was a stockholder and director would be liable.

XIII.

Before you can hold the defendant liable for the conversion of any timber that may have been taken from public lands and sawed at the Bonita Mill from the Hellgate country, it will be necessary for you to find either that A. B. Hammond was a principal or an agent in the acts of trespass from which the conversion has resulted. If you find that A. B. Hammond at no time had any interest, either direct or indirect, in the Bonita mill while the same was operated by Fred A. Hammond or George W. Fenwick, and that he did not in any manner participate in the cutting of the timber, or in the manufacture and sale thereof, then I charge you that A. B. Hammond is not legally liable for the taking thereof.

XIV.

If you find from the evidence that the Montana Improvement Company erected the Bonita mill and sold the same to Fred A. Hammond, and that Fred

A. Hammond in turn sold the same to George W. Fenwick, and that from and after the time of the said sale neither the Montana Improvement Company nor the defendant A. B. Hammond had any interest whatsoever in the said mill, then I charge you that the said Montana Improvement Company would not be liable unless it were shown by a preponderance of the evidence that prior to the sale to Fred A. Hammond it had cut logs upon some portion of the land involved in this action. Whether or not there is any evidence in the record to the effect that the Montana Improvement Company ever cut any logs, is a question for the jury. But even if the Montana Improvement Company should be found by [683] you so to have cut timber, then the defendant would not be liable for such cutting merely because he was the owner of a portion of the stock of the Montana Improvement Company, or was an officer thereof. As already said to you, in the case of a corporation a stockholder or officer is not personally liable in conversion merely because he is a stockholder or officer. He is liable only in case he has himself personally participated in the conversion, and then he is held liable in law not because of the fact that he is a stockholder or officer; that fact has nothing to do with the question. He is liable in such case because of his personal participation in the conversion.

Thereupon the Court instructed the jury as follows:

Instructions of the Court to the Jury.

The COURT.—Gentlemen of the jury, as I suggested to you at the moment of recess, all that re-

mains for a final submission of this cause to you for your consideration, is that the law shall be stated to you which must govern you in arriving at your verdict. That is required to be given to you by the Court, and it is an obligation cast upon you by the law that you will observe the principles that are stated to you by the Court in your deliberation on the evidence for the purpose of reaching your verdict.

If, during the course of the trial, either in the taking of evidence or during the arguments of counsel suggestions have been made to you as to what counsel conceive the law to be in any particular relating to this case, you will entirely discard such suggestion from your consideration, not necessarily because counsel may have been mistaken in stating what they believe to be the law; but to avoid any confusion on your part as to what the law is by which you are to be governed, it must be taken by you [684] from the Court. This is so for the reason, as suggested to counsel during the progress of the argument, that the law provides a method of reviewing any error committed by the Court in giving the jury the law of the case; whereas, on the other hand, should the jury give ear to and act upon suggestions made by counsel, there would be no tangible means to correct any error committed by you in that regard.

Now, with these preliminary considerations I shall proceed to state to you the principles that in my judgment pertain to this case, and which you will apply to the evidence in the consideration of the evidence.

This is an action by the Government to recover from the defendant A. B. Hammond the value of a

large quantity of lumber—stated in the complaint to amount to 21,185,410 feet, board measure—the property of plaintiff, alleged to have been appropriated and converted by defendant. In that respect it is alleged by the plaintiff that this lumber before its manufacture was in the shape of timber standing and growing upon certain public lands belonging to plaintiff described in the complaint, and that while so standing upon plaintiff's said lands and the property of plaintiff, the defendant unlawfully and without right entered upon said lands, and cut down and felled it, carried it away and manufactured it into lumber, and sold and converted it to his own use and that of certain corporations named in the complaint. That is to say, the complaint alleges, in substantive effect, not that the defendant individually and unaided took this great quantity of lumber for and by himself alone, but that it was done through the instrumentality of the corporations named of which it is alleged the defendant was at the time the general manager [685] directing their business and operations in that regard, and that it was in this capacity that defendant committed the acts complained of through the aid and assistance of such corporations and by that means converted the lumber to his own use and that of said corporations, whereby it was wholly lost to the plaintiff. It is charged that the acts of the defendant in taking and converting the lumber were committed wilfully and knowingly and with full knowledge that it was the property of plaintiff and that neither defendant nor said corporations had any right whatsoever thereto.

Should you find these allegations of the complaint to be true; that is, should you find that plaintiff's lumber in the quantity alleged, or in any less quantity, has been taken by the defendant for the purpose and under the circumstances counted upon, then under the law plaintiff will be entitled to a verdict against the defendant for the entire quantity of lumber so taken. This is so because the manner of the alleged taking and appropriation, if true, constitutes what is known in the law as a trespass or tort, in other words, a wrongful taking of property, and in such form of action each individual engaged in the wrongful act complained of is personally responsible for the whole amount of damage suffered through such wrong, no matter how many may have participated or been concerned therein and whether he has himself benefited much or little by such wrong. The law does not undertake to apportion between a number of persons engaged in a tortious or wrongful act the extent of each man's individual responsibility as between themselves; they are left in that regard where their acts leave them. It gives to the party injured by the wrong a right of action for its redress, and where the act is committed by more than one he [686] may sue one or more or all as he sees fit and recover the entire loss to which he has been subjected from the one or more he elects to sue. It will not be material in this case, therefore, should you find that plaintiff's property has been taken by defendant in the manner alleged, whether the defendant reaped the whole or only part of the fruits of such taking; he would be responsible to plaintiff in either event for

the entire loss suffered by it, precisely as if he had received all the benefit therefrom. On the other hand, the party injured has under the law but one right of action for the wrong, and if he elects to sue one of a number of wrong-doers or joint tort-feasors, as they are termed in the law, and fails to secure full redress, his right is at an end and he cannot then resort to further action against the others.

You will understand, in determining defendant's responsibility, that the mere fact that the defendant happened to be a stockholder or an officer of a corporation which may have been guilty of converting the lumber in question, and of which he may have received a part of the benefit, would not of itself, in the absence of some showing of his personal participation in such conversion, render him individually liable therefor. There must appear some act on his part disclosing an intent and purpose to aid and assist in such wrongful act of a character to show that he was aware of the purpose intended to be accomplished. Participation, in the sense here employed, does not mean a mere passive acquiescence in the acts of others when no active aid is given or encouragement lent to the commission of the wrong. In other words, to make the defendant liable the evidence should show, not only that the lumber in question was the property of the United States, but that the defendant Hammond either directly or through his agents, or jointly with some other person, did some [687] act which was inconsistent with such title and right of possession of the plaintiff and tended to some positive extent to deprive it wrong-

fully of its property. If any such acts by the defendant are shown by the evidence, then the defendant is liable.

If you find that any of the timber for the conversion of which the action is brought, belonging to the United States, was taken and converted by W. H. Hammond, sometimes called Henry Hammond, or G. W. Fenwick, or Fred Hammond, or any of the corporations named in the complaint, but without the aid, connivance or participation of the defendant in any manner, then although the proceeds of such conversion or some part thereof may have been subsequently paid to or came in the course of business to a corporation of which the defendant was a stockholder or officer, the defendant would not be liable for timber or its proceeds so converted. But if you find that timber so taken and converted, although ostensibly taken in the name and for the benefit of said parties named, or any of them, was in fact taken for the benefit of defendant and his associates, with the aid, connivance and at the direction of the defendant in the manner alleged, then the defendant would in law be a participant in such taking and would be personally liable therefor, no matter where the proceeds eventually went. Any act of wilful interference with property such as that sued for herein, without lawful justification, whereby the person entitled thereto is deprived of its possession, is a conversion. A person may be guilty of a conversion of property without himself personally and directly performing the act of taking or carrying it away. If it is taken by his aid and con-

nivance or at his instigation or direction, although the physical taking is by and in the name of others and without his [688] immediate presence, he is nevertheless responsible as a participant.

The theory advanced by the plaintiff in this case as to the method pursued in the alleged conversion is that the lumber sued for was taken as the result of a continuing series of acts covering a number of successive years, but all a part and parcel of one general unlawful scheme and arrangement entered into between the defendant and his associates under the guise and form of different corporations organized by them with the intent, and designed to accomplish their purpose, of appropriating such lumber; and that the operations to that end were carried on by such corporations by the means of establishing different mills and logging camps in the names of, or conducted by, different individuals or corporations, but all in fact connected and acting in concert, and all under the general direction and management of the defendant for said corporations. Not that the defendant was absolutely in control of such corporations or nominally their general manager, but that the operations carried on to take and appropriate the plaintiff's lumber were in a general way under defendant's direction and control. If you find that this theory is sustained by the evidence, it would establish an unlawful taking and it will not be material to the defendant's responsibility that he should be shown to have been immediately present on each occasion that lumber was taken and personally directing the operations. It will be sufficient if it appear that any lum-

ber so taken was cut and carried away as a result of the general directions or instructions of the defendant in pursuance of such concerted plan, and was subsequently appropriated by defendant for the benefit of himself and the corporations named with a knowledge [689] that it was the property of the plaintiff.

In determining the truth of this theory, you may consider the relationship, if any, by blood, marriage or otherwise, shown to exist between the defendant and those immediately employed or engaged in the mills and logging camps in taking off the timber during the period involved from the lands in question, and all other facts and circumstances shown which in your judgment tend to throw light upon the question of the defendant's responsibility in the premises.

A citizen should not be lightly held responsible for a violation of the rights of the Government so serious as that here alleged, but if the evidence, after a careful consideration of it in all its bearings, warrants that conclusion, it will be your duty to so find.

The burden of proof as to the facts alleged in the complaint rests upon the Government. Being the plaintiff, it is called upon to establish the facts on which its right of recovery depends by a preponderance of the evidence; that is, by evidence which in the judgment of the jury is to some extent stronger and more satisfactory than that which is opposed to it. This rule does not require the plaintiff to produce the greater number of witnesses to any fact, for the evidence of one witness or of a circumstance may be more satisfactory to the jury as tending to estab-

lish a fact than that of a dozen witnesses opposed to it. All that is required is that the evidence produced by the plaintiff shall be regarded by the jury as more satisfactory and reliable as the basis of a verdict than that which contravenes it. The case is not governed by the rule in criminal cases requiring proof beyond a reasonable doubt. While the wrong alleged against the [690] defendant is a serious trespass, it is purely a civil wrong and not a criminal act. If the evidence is evenly balanced between the parties, and there is no preponderance in favor of plaintiff, then plaintiff is not entitled to recover.

As to any special defense set up by defendant, there the burden of proof rests upon the defendant to establish such defense to a like extent. In this respect the defendant pleads in justification of the cutting and conversion of part of the timber in question the right so to do under the act of June 3d, 1878. That act authorizes citizens of the United States and other persons, *bona fide* residents of certain States and territories, to cut for building, agricultural, mining or other domestic purposes, any timber or trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in the State or territory of which the parties cutting are residents.

The word "residents" as herein used includes domestic corporations, that is, corporations organized and existing by virtue of the laws of the State or territory wherein they are cutting and removing timber from the public domain.

This authority is given subject to regulations authorized to be made by the Secretary of the Interior, for the protection of the remaining timber and undergrowth. Pursuant to the authority thus conferred, the Secretary of the Interior, on August 5th, 1886, prescribed, among others, the following regulation:

“Every owner or manager of a sawmill, or other person felling or removing timber under the provisions of this act, [691] shall keep a record of all timber so cut or removed, stating time when cut, names of parties cutting the same or in charge of the work, and describing the land from whence cut by legal subdivisions, if surveyed, and as near as practicable if not surveyed, with a statement of the evidence upon which it is claimed that the land is mineral in character, and stating also the kind and quantity of lumber manufactured therefrom, together with the names of parties to whom any such timber or lumber is sold, dates of sale, and the purpose for which sold, and shall not sell or dispose of such timber, or lumber made from such timber, without taking from the purchaser a written agreement that the same shall not be used except for building, agricultural, mining, or other domestic purposes within the State or territory; and every such purchaser shall further be required to file with said owner or manager a certificate, under oath, that he purchased such timber or lumber exclusively for his own use and for the purposes aforesaid. (5) The books, files, and records of all millmen or other persons so cutting, removing, and selling such timber or lumber, required to be kept as above mentioned, shall

at all times be subject to the inspection of the officers and agents of this department. (6) Timber felled or removed shall be strictly limited to building, agricultural, mining, and other domestic purposes within the State or territory where it grew.”

The regulation just quoted is a lawful and reasonable one and imposes upon a person or corporation engaged, after its promulgation, in conducting a saw-mill, or engaged to a considerable extent in such cutting, or who makes a business of cutting timber on mineral lands and selling it, to keep the record prescribed above; and without the observance of which such cutting cannot legally be done. In this case defendant has [692] offered no evidence tending to show a compliance with these regulations, and I accordingly instruct you that for that reason defendant has failed to bring himself within the protection of the statute of 1878, and is not relieved of liability for any timber so cut since that regulation was adopted by reason of the fact that said lands may have been in fact mineral in character. You may, however, as indicated by the ruling of the Court during the trial, consider the evidence offered by defendant and admitted, touching the character of the land along the Hellgate, as bearing upon the question of the good faith of those taking timber on those lands in the asserted belief that they were entitled so to do by reason of the lands being mineral in character, solely for the purpose of determining the measure of damages for such taking in the event you find the defendant responsible therefor.

In this connection and as bearing on the question

of such good faith, you will understand that the phrase "said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry," as used in the act of June 3d, 1878, does not mean that a person is entitled to cut from the public domain merely because of the fact that there may be some known mineral lands within the vicinity of the lands from which timber is cut. Nor does the term mineral lands as here used include all lands in which minerals may be found, but only those lands where the mineral exists in sufficient quantity to pay for its extraction and known to be such at the time and to the persons cutting. If the land in question is worth more for agricultural purposes than mining, it is not mineral land within the meaning of the act, although it may contain some measure of gold or silver or other valuable [693] minerals. This is also true of timber lands. If the lands along the Hellgate River from which a portion of the timber in question was cut, were more valuable for the timber standing and growing thereon than for the minerals contained therein, then such lands were not mineral in character and not subject to entry under the then existing mineral laws of the United States, and neither the defendant nor the corporations named had a right to cut timber from such lands under the act of June 3d, 1878. These things anyone taking timber from such lands is presumed to know, and if timber is taken without actually ascertaining the character of the land it is taken at the peril of being held responsible therefor.

In determining the question as to the good faith

with which any such cutting and removal was done, you have a right to consider whether it is reasonable and probable that one cutting and removing timber from such lands in the honest belief that he had a right so to do would have been likely to ignore the rules and regulations provided by the law for the cutting of timber on such lands; and if you find that such course does not accord with your reason and judgment, then you are not bound to believe the testimony of those doing such cutting that they were acting in good faith therein.

The defendant seeks also to justify the cutting and removing of the timber from the SE. $\frac{1}{4}$ of section 28, township 14 north, range 14 west, by reason of the fact that the same was embraced within the Homestead Entry of one Henry F. Edgar—commonly referred to in the evidence as the Edgar Claim. The evidence shows without controversy that Edgar did not perfect the homestead right so initiated and did not receive a patent for said lands, but that the same reverted to the United [694] States and the said Edgar lost all of his rights in the land and the timber growing thereon at the time of the initiation of his entry. In this connection you are instructed that a settler on public land covered by an unperfected homestead entry who cuts and removes timber therefrom, other than for necessary buildings and improvements and clearing for cultivation, is in law a wilful trespasser, without regard to the question of his good faith in making the entry, and if you find that the defendant, or any of the corporations or persons associated with him, acting under his direc-

tion and control, cut and converted the timber in question from the SE. $\frac{1}{4}$ of said section 28, whether with the consent of Edgar or not, then the defendant is liable for the full value of the timber so cut and carried away at the time it was sold.

The defendant further sets up in his answer that the cutting and removing of the timber from the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 18, township 14 north, range 15 west, was authorized by a permit issued by the Secretary of the Interior on January 16, 1892, to the Blackfoot Milling and Manufacturing Company under and by virtue of the provisions of the Act of March 3, 1891, which permit was afterwards transferred to the Big Blackfoot Milling Company. The permit so issued was made subject to certain conditions, restrictions and limitations therein set forth and which have been read to you. The act provides that the Secretary of the Interior may designate the sections or tracts of land and prescribe the conditions, limitations and restrictions under which the cuttings shall be carried on. In this instance, as stated, the Secretary of the Interior did prescribe the conditions, restrictions and limitations under which said corporations could cut timber [695] from the lands last above described, by inserting them in the permit itself. These conditions, restrictions and limitations were reasonable, and it was the duty of those acting under such permit to comply therewith. If you find that the said corporations named, acting under and through the direction and control of the defendant, cut and removed the timber from the lands last described, without complying

with the conditions, restrictions and limitations embodied in said permit, then neither they nor the defendant acquired any right whatsoever in and to the timber so cut and removed, but such cutting was a trespass and the plaintiff is entitled to recover for the value of such timber if converted as alleged. Moreover, it was the duty of those cutting under said permit to know and ascertain the lines bounding the land from which they were entitled to cut timber thereunder, and the fact that they may have misapprehended their rights under such permit will not justify a cutting outside such lines, nor will it mitigate the damages resulting therefrom. In other words, although the jury may find that defendant or those under his direction cut outside of the lands included in such permit under the mistaken belief that the permit included the lands from which they did cut, they would in law, as to the lands outside of this permit, be trespassers and liable to the plaintiff for the value of any timber so cut.

You will bear in mind that the plaintiff has, at the trial, abandoned its right to recover for the timber cut and removed from the NW. $\frac{1}{4}$ of section 2; the SE. $\frac{1}{4}$ of section 8, and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 22, all in township 14 north, range 14 west, and you will eliminate from your consideration all evidence as to the cutting and removing of timber from these lands [696] included within such abandonment.

If the jury find that the timber sued for or any portion thereof was taken and converted by the defendant and his associates as alleged, then it will be

necessary to determine the quantity and value of that so taken in order to fix the amount of your verdict. In a case such as that disclosed by the evidence this is an inquiry of some difficulty. The transactions involved not only date far back in time but cover a series of years, and that alone would tend to render proof more difficult than if those transactions were more recent. But if you find that the taking was wrongful, as is necessary in order to hold the defendant responsible, and that the manner of the taking was such as to enhance the difficulty of the plaintiff in establishing the exact extent of its wrong, then the law authorizes you to indulge every fair and reasonable inference justified by the circumstances in fixing the amount which the plaintiff has suffered. The proof should tend to establish the amount of damage with comparative or reasonable certainty, but it need not be shown with that precise exactitude which would be required under other circumstances. This is because the law will not permit a defendant to profit by reason of the fact that by his wrongful act he has made the establishment of the exact extent of the injury done difficult of proof. This does not mean that the plaintiff must not prove the extent of his damage, but he is only required in such a case to afford the jury a basis of reasonable certainty for its verdict. Such reasonable basis, however, the evidence must furnish, since you are not permitted to guess or speculate as to the amount of your verdict. If the evidence leaves the question of plaintiff's damage so entirely uncertain that the jury are [697] wholly unable to determine it, then, even though you

find the defendant responsible, the plaintiff cannot recover beyond nominal damages.

It is alleged in the complaint that the value of the timber from which the lumber sued for was cut, while standing on plaintiff's land, was one dollar per thousand feet, board measure; that its value when felled and ready for sawing was five dollars per thousand feet; and that when manufactured into lumber its value was ten dollars per thousand feet, like measure; and it is alleged that the value of the whole quantity of lumber taken and appropriated by defendant was the total sum of \$211,854.10. But should you find that plaintiff is entitled to recover, you will fix the value of the lumber taken from the evidence according to the rule or measure of damages hereinafter stated to you, and determine the amount of your verdict therefrom. The value alleged is merely the plaintiff's estimate, and that is always subject to control by the evidence in the case.

If, under the principles I have stated, you find that the defendant, or any of the corporations named acting under his direction and control, knowingly and wilfully cut and converted the timber mentioned in the complaint, or any part thereof, then the plaintiff is entitled to recover the market value of the timber so converted in whatever condition or form it may have been at the time of its disposal or sale.

If you find that the defendant, or any of the said corporations while acting under his direction and control, converted the timber mentioned in the complaint, or any part thereof, under the honest but mistaken belief that he or they had the right under the

law to cut and remove such timber, then in assessing the damages you will fix the value of the same at the time of [698] conversion less the amount which was added to its value before sale; in other words, if you find that timber was so cut and removed from lands of complainant and that there was added thereto certain value by reason of the manufacturing of said timber into lumber for the market, then the measure of damages will be the difference between the expenses incurred in the manufacturing of said lumber and the price for which it was sold in the market.

In fixing the amount of any verdict you may find for the plaintiff, you should include interest on the value of any lumber so converted from the date of such conversion to the present time.

Should your conclusion be that the plaintiff has not shown itself entitled to recover, then your verdict should be for defendant.

Now, gentlemen of the jury, that comprises all the specific suggestions that I deem it necessary to submit for your consideration. There are some general features of the law, however, which it is pertinent and proper that I should suggest to you.

As I have stated, you are bound to observe the law as given you by the Court in your deliberation upon the evidence for the purpose of reaching your verdict, but the question as to what facts have been shown by the evidence that has been introduced before you is one entirely for your determination. With that function the Court neither has the right nor the disposition to in anywise interfere.

It is the privilege of the Federal Courts, if they see fit to comment upon the evidence, and give the jury their views of what it tends to show, but I have rarely felt called upon to [699] comment upon the facts because my observation of the class of jurors we get in these courts is such that I find that they, as a rule, are entirely capable of drawing correct deductions from the evidence and formulating their verdicts, unaided by any suggestions from the Court in regard to the facts. It strikes me that under ordinary circumstances that is the fairer way, so I have rarely indulged in the practice of commenting upon the evidence to any extent.

You have the aid of counsel in your consideration of the evidence in the case through their arguments; but I wish to say to you that you are only to accept the suggestions of counsel to the extent that they tend to enlighten you, not alone as to the evidence that has gone in, but as to the proper deductions to be drawn therefrom, and the facts to be found based thereon. If the suggestions of counsel are calculated to carry you outside of that line, then, of course, you will entirely disregard them. Counsel very frequently, in the heat of argument and in their zeal, are inclined to suggest views of the evidence and deductions to be drawn therefrom which in fact are not warranted. This is entirely excusable because, as I say, in the heat of argument, through that spirit of partisanship which is proper in an advocate, counsel are often unconsciously led to assert what the evidence does not support, and the jury is cautioned not to accept anything which does not fall in

with their own good reason and judgment deduced from a fair and careful consideration of the evidence in the case; because, gentlemen, eventually upon your shoulders alone rests fully and completely the responsibility of the verdict which you must render in this case. The fact that you may be led into error by some suggestion which should have found no place in your consideration will not relieve you; therefore, I say that while you are entitled to the enlightenment that counsel may give, [700] if they have inadvertently misstated a fact, or inadvertently sought to draw deductions from facts admittedly in the record which do not accord with your judgment, you must ignore them and draw conclusions for yourselves independently and aside from any suggestion of counsel.

You are, also, necessarily the judges of the credibility of the witnesses. This is because you pass upon the facts. Now, you are all intelligent men, and perhaps it is really unnecessary for me to state in any detail the method by which we determine the credibility of witnesses. A witness going upon the stand is presumed to tell the truth. That does not mean that he always will tell the truth, and that does not mean that the jury is bound to find that he has always told the truth; but a witness is entitled in going upon the witness stand to the presumption in his favor that he is telling the truth. You are only entitled to determine that he has not by certain well known tests which you apply sitting as judges of the effect of his testimony as given. You observe the manner of the witness and his general character as

developed in his manner of testifying; how fair and unprejudiced or otherwise he may appear from the testimony given by him; whether there appears on his part any interest in the case growing out of any circumstances that appear in the case, and how far his evidence accords with that of other evidence which you are inclined to believe; how far it is inconsistent with other evidence in the case, and from those things you make up your minds as to the degree of credibility which you will accord to the testimony of any witness who appears before you.

If a witness is shown to have made statements at some previous time at variance with his evidence upon the witness [701] stand, and the jury is of the opinion that that has not been the result of inadvertence or mistake, it should make you cautious in viewing all the evidence of that witness.

If you are satisfied that a witness has come upon the stand and deliberately told you what was untrue, not as the result of mistake or inadvertence, but with intent to deceive, then you have the right to discard his entire evidence from the case, unless you are satisfied from the other evidence that it is in some respects true.

Now, in this case a very large part of the evidence has been submitted before you by deposition. The law draws no distinction, primarily, as between the effect of evidence introduced before a jury by deposition, and that which is given orally from the witness stand, but, of course, it will readily strike you that you have not before you all the same tests for determining the degree of credibility that you will

accord to a witness whose evidence is read to you, as you would if he had appeared on the witness stand; but you should apply to evidence given in the form of depositions the same rules so far as compatible with the circumstances, as you do to those witnesses testifying in open court. You observe the character of the testimony, how far it appears to be reasonable, and how far it accords with other evidence in the case, and from that you make up your mind how far you will accord credibility to that character of evidence. Some of the other tests I have mentioned you, of course, cannot apply in the absence of the witness.

It is hardly necessary for me to suggest to you that this is a case of great importance not only to the Government but to this defendant himself. The charge, as I have suggested, is not a criminal one, but it is nevertheless a serious one. If the Government has lost the large amount of timber that is alleged [702] here, or even less than that entire amount, and it has been lost through the wrongful act of this defendant, then, regardless of the consequences to the defendant, or those connected with him, the Government is entitled to have that wrong righted by a recovery.

On the other hand if this charge has been made against the defendant without circumstances of justification, then he is equally entitled to have that charge refuted by a verdict at your hands in his favor. That makes the issue an important one in this case. I wish to charge you, gentlemen of the jury, with all solemnity, that you must determine

this case solely and alone from the evidence in this case, and through no other consideration.

Some suggestion was made to you during the argument that perhaps this case was instigated through some sentiment of malice or other sinister motive. I do not know that counsel intended that suggestion with any serious idea of intimating to you that you could be affected to any consideration of that kind, but aside from the fact that there is no evidence in this case to warrant you in reaching any such conclusion, it could make no possible difference to you if this suit had been instigated by the worst enemy that the defendant had in the world, and that is because if one is under obligation to another, either contractual or as a result of a wrong, for which that other has a right to sue in the courts, it cannot make a particle of difference in the consideration of the trying tribunal what motive actuated the bringing of the action. All the tribunal has to do, all you have to do, and all that you can under your oaths do, is to determine the case from the facts that are shown by the evidence. If a plaintiff, however malicious his purpose may be in bringing the suit, is entitled under the law to a recovery, he is entitled to it precisely the same as [703] though it had been brought with the most innocent and sincere purpose to recover his rights. No matter what degree of malice might appear behind a case of this kind, it would be an injustice for the jury to be actuated to any extent by a consideration of that malice by deciding unjustly; therefore, I say, that consideration is something with which you have nothing what-

ever to do. You and I sit here simply and solely to determine the rights of those parties under the law, and as disclosed by the evidence, and I am sure that none of you will permit yourselves when you retire to your jury room to be actuated by other than a full, fair and impartial consideration of the evidence in this case.

Now, gentlemen of the jury, as usual in such cases, the clerk will have prepared forms of verdict which you will find accord with the suggestions I have made to you. If you in your wisdom should reach a conclusion that this plaintiff is entitled to a verdict at your hands, then you will find a form in which you can answer the question, which, as I have heretofore suggested to you, should cover the value of any timber according to the measure of damages I have given to you, that has been unlawfully taken from it, with interest on that value from the time of the conversion; but should your verdict be that the plaintiff has failed to maintain its action, and you find for the defendant, then you will find a form for that finding.

In the Federal Court the verdict of the jury must be unanimous, and not by a divided jury as under the State system.

Have counsel any suggestions to make?

Mr. HALL.—I have no exceptions, but I merely suggest at this time that the rate of interest should be stated to the jury by the Court. [704]

The COURT.—The rate of interest is the legal rate of seven per cent.

[Exceptions of Defendant to Charge of Court to Jury.]

Thereupon defendant excepted to the charge of the Court to the jury, as follows:

Mr. WHEELER.—First of all, with regard to the regulations of the Secretary of the Interior as to the matter of keeping records, getting affidavits, and so forth, I except to that portion of the instructions, and particularly that part thereof that holds the regulation to be lawful and reasonable. Next, that the said regulation imposed a duty upon one situated as Mr. Fenwick was. I claim that the law did not compel him to do that.

Next, as to the balance of the rules and regulations adopted: first, those that were in force when Fred Hammond and when Mr. Fenwick began their operations of their mills. I claim that those regulations were kept, and except to the Court's instructions because the instructions do not cover that period and eliminate it.

The COURT.—I only referred to the period after the promulgation of the rules.

Mr. WHEELER.—Yes. Next because it does not cover an instruction to the jury which would imply that all of those regulations save the particular one were kept. The one I refer to being the one with regard to affidavits, keeping books, records, etc. From my standpoint that is the only one that was not kept; all the rest being kept.

Next an exception to the Court's instruction defining mineral lands, and next as to its having been

necessary that mineral lands should be so defined during the period that Mr. Fenwick was operating the mill. I claim that there is an estoppel [705] or something in the nature of an estoppel against the Government—

The COURT.—In view of your suggestions during the trial, and from the fact that I could not sustain that view, I will state to the jury that there could be no such estoppel as you have suggested.

Mr. WHEELER.—That will necessitate my taking an exception to that instruction.

The COURT.—The theory advanced by counsel is that an estoppel grew out of the failure of the government to call for these records.

Mr. WHEELER.—We claim that the line of conduct of the Secretary of the Interior with regard to what they could do, and the repeated decisions of the Courts down two and a half years ago was a precedent which even the Government itself could not go back on and make that unlawful which was lawful.

The COURT.—That you will understand, gentlemen of the jury, the Court has instructed you does not have the legal effect of an estoppel such as suggested by counsel.

Mr. WHEELER.—Next, that portion of the instruction with regard to the mineral land, in which it is stated that it must be more valuable for mineral than for timber. I claim that if it is mineral it makes no difference what its value is so long as it has some value. I take an exception to that portion.

Next, with regard to the instruction as to the rights Edgar had upon the property as a pre-emptioner in cutting and disposing of his timber. I except to the Court's view of the law upon that point, particularly specifying that a man has the right to remove the timber not only for buildings, improvements and clearing purposes, but that he even may cut the timber for the purpose of [706] selling it and using the money to pay for his land.

With regard to section 18, township 14 north, range 15 west, and the matter of cutting under the permit, there is nothing in the evidence to show that the cutting actually done was not in accord with the conditions and that the burden of proof is not upon the defendant, but is upon the plaintiff to show the extent, where and wherein the terms of the permit were not complied with. I except to that portion which instructs with regard to said section 18 upon that ground.

Next, there was a portion of the instruction which seemed to imply that the defendant Hammond was in control of the corporation at the time the cutting was done on Government land.

The COURT.—I left that question entirely to the jury.

Mr. WHEELER.—I would have no objection to the Court's suggestion. The Court left it to the jury to decide as to the quantity and value of the timber taken. There is an implication in the instruction, inadvertent I think, that there is evidence in the case from which the jury could imply that it

was made more difficult for the Government to prove its case.

The COURT.—I said if the jury found that the character of the taking was such as to make it more difficult.

Mr. WHEELER.—But not to imply that circumstances were such?

The COURT.—That is a question for the jury. I leave that question to the jury, if they find that by reason of the wrongful taking it has made it more difficult.

Mr. WHEELER.—I take an exception to that. It may be hypercritical, and probably is.

The COURT.—Of course, you can save your exception.

Mr. WHEELER.—Yes. I may be wrong. Next, as to the measure of damages. We except as to the measure suggested by the Court. We claim that the only measure that can exist under the circumstances [707] is the value of the stumpage in the tree, and I think your Honor's instructions add to it another element.

I also except to your Honor's instructions with regard to interest.

DEFENDANT'S EXCEPTION TO THE FAILURE OF THE COURT TO INSTRUCT THE JURY AS REQUESTED BY DEFENDANT.

Thereupon defendant excepted to the failure and refusal of the Court to give the said instructions, and each of them, requested by said defendant, and heretofore in this Bill of Exceptions set forth and numbered, respectively, I to XIV, inclusive.

Thereupon, on Friday, February 7, 1913, at 3:05 P. M., the jury retired for deliberation.

[Proceedings Had February 8, 1913, on Return of Jury into Court, etc.]

Saturday, February 8, 1913, 10:10 A. M.

Thereupon the jury returned into court, and the foreman of the jury stated that the jury had not been able to come to any agreement as to a verdict as yet. The foreman stated that the jury would like to have read to it the testimony of Thomas G. Hathaway; Sidney C. Mitchell and Gust. Moser, and also the instructions of the Court regarding the liability of the members or the officers of a corporation.

Thereupon the entire testimony of the said witness, Sidney C. Mitchell, was read to the jury.

Thereupon the testimony of Thomas G. Hathaway, commencing at the beginning of said testimony, that is to say, the direct examination of said witness was read by counsel for plaintiff, in its entirety, down to and including the following question and answer contained in the direct examination of said witness:

Q. Did the Montana Improvement Company, or Eddy-Hammond [708] & Company, or the Missoula Mercantile Company, or any company, firm or corporation, of which A. B. Hammond was connected, continue to receive the product from the Fred Hammond mill at Bonita up until the time it ceased to operate?

A. We took the product of the mill; that is, one of the companies I was connected with.

Thereupon the following took place:

The COURT.—Now, gentlemen, I want to ask you as intelligent men, if this accords with your ideas as to the proper method of getting at the facts in this case, having this evidence reread to you in extenso in this way?

The FOREMAN.—It is simply for the purpose of refreshing the memory of one or two jurors. That is the only purpose of making this inquiry.

The COURT.—It is not proper to either party to refresh the memory of any juror who has a hazy memory of some particular testimony. If he has a hazy memory as to one feature of the case, he may likewise have a hazy memory as to another feature.

The FOREMAN.—The matter that we have been discussing is Mr. Hammond's connection with these corporations.

The COURT.—Well, now, gentlemen, the question of the connection of Mr. Hammond with these corporations runs throughout this entire case from beginning to end. The question of the relationship of the defendant to these corporations is something to be gathered from the testimony of every witness that mentioned the subject in his testimony. It would be unjust to Mr. Hammond on the one side and unjust to the government to undertake to determine the question of Mr. Hammond's responsibility from the testimony of one individual, or two individual witnesses if there is other evidence in the case bearing upon that subject. [709] I am willing to do everything in the world that I can to help you, but I do not approve of this rereading of the

testimony here at this time.

Mr. WHEELER.—To stop at this point in this witness' testimony would be most unfair to us. This witness in his cross-examination directly contradicts some of the statements he makes in his direct examination.

The COURT.—All of this evidence is before this jury. It is not as though only a part of it had been read and another part had never been read.

Mr. WHEELER.—Will your Honor kindly hear me through on this matter?

The COURT.—I am dealing with this jury. I cannot permit any interruption by counsel. I have dealt with a great many juries, and I want to aid this jury. I do not want to have the time of this Court and this jury consumed in a manner that from my experience and observation is going to result in no eventual enlightenment.

Mr. WHEELER.—This witness on his cross-examination says that he was mistaken as to some of the matters that have just been read in evidence.

The COURT.—I will not have any further explanation of this testimony or this evidence before this jury. Counsel have both had an opportunity to argue this case. I am not going to let them argue it again here. I have simply stopped to suggest to the jury that if we are going on in this way we will never get through with this case. The jury must reach their verdict in this case from all of the evidence. The question as to a certain fact does not necessarily depend upon the positive and direct declaration of a witness upon the stand, if there are

other [710] portions of the case in which circumstances have been shown which throw light upon that fact. I trust I make myself plain. It is not within the province of the jury to stop at the consideration of the evidence of any one witness in this case. They must, in order to do justice to these parties, consider it all. If there is a question in the mind of a juror as to some particular feature of some one witness, why, it is the very proper and usual thing to read the testimony of that witness, but not to have a large part of the record reread to the jury, which they have sat here and listened to. We will go on and finish the testimony of this witness.

Thereupon counsel for plaintiff continued reading the direct examination of the said witness, Hathaway, in its entirety, and until the close of the testimony of the said witness given upon said direct examination—the reading of said testimony beginning immediately following the question and answer hereinbefore set forth in this Bill of Exceptions as the point at which said reading had been interrupted by the Court.

Thereupon the Court retired from the courtroom for a few minutes, during which time the jurors consulted amongst themselves.

The FOREMAN.—(Upon the return of the Court.) The jury seems to come to the conclusion that they do not require the reading of Mr. Moser's testimony. Is there any way that counsel can agree not to read the balance of this testimony?

The COURT.—It is not a question for counsel at

all. Counsel have nothing to say about this. It is a question for the enlightenment of the jury. All of this evidence has been heard by the jury. If this evidence had never been recited to the jury [711] that would be a different thing, and then counsel would have something to say about it. Now, it is for the jury to say what they want their minds refreshed upon.

The FOREMAN.—They say that they do not wish any more of this.

The COURT.—Very well, we will stop.

Thereupon defendant offered to read the cross-examination and recross-examination of the said witness, Hathaway, and particularly that portion of the testimony of said witness relating as to what disposition was made of the product of the Fenwick mill at Bonita; but thereupon the Court refused defendant permission to read said testimony, comprising the cross-examination and recross-examination of said witness, or any part thereof—the Court remarking that it had stopped the reading of the testimony because the jury announced that they did not desire to hear any more. To which ruling of the court, defendant duly excepted.

Defendant's Exception No. 40.

Thereupon at 11:50 A. M. of Saturday, February 8, 1913, the jury retired for further deliberation, and at 9:35 P. M. of said day, returned into court and rendered a verdict in favor of the plaintiff and assessed the damages against the defendant in the sum of fifty-one thousand and forty dollars (\$51,040.00).

Thereupon the Court ordered a stay of execution for thirty (30) days.

The foregoing constitutes all the proceedings had and all the testimony offered and received on the trial of said action.

And now within the time required by law and the rules of this Court, as extended by the stipulations of the parties and the orders of the court, defendant proposes the foregoing [712] as and for its Bill of Exceptions to the rulings of the Court, made during the trial of the above-entitled action, and prays that it may be settled and allowed as correct.

CHAS. S. WHEELER,

W. S. BURNETT,

Attorneys for Defendant.

Stipulations Concerning Bill of Exceptions.

IT IS HEREBY STIPULATED by and between the parties to the above-entitled action as follows:

(1) That the above and foregoing constitutes a full, true and correct Bill of Exceptions in the above-entitled cause as to the rulings made upon the trial of the above-entitled cause, and that the same may be settled and allowed as and for the Bill of Exceptions to such rulings.

(2) IT IS FURTHER STIPULATED that the Bill of Exceptions proposed by defendant, upon which the above and foregoing Bill of Exceptions is founded, and the Amendments thereto proposed by plaintiff, were each, severally and respectively, duly and regularly prepared, served, filed and presented, to the Court and to the Judge who tried said cause,

for the settlement thereof, and were settled by such Court and Judge, all within the time required by law and the rules of said court and upon the stipulation of the parties with the order of the Court entered thereon extending the time for the performance of said several and respective acts from time to time, without lapse, and from term [713] to term, without lapse, since and including the term during which the trial of said cause was had until and including the present term, to wit, the term of court commencing the first Monday in March, 1914.

Dated: May 13th, 1914.

JOHN W. PRESTON,

United States Attorney,

FRANK HALL,

Special Ass't to Attorney General,

Attorneys for Plaintiff.

W. S. BURNETT,

CHAS. S. WHEELER,

Attorneys for Defendant.

**Order Settling, Certifying and Allowing Bill of
Exceptions.**

The foregoing Bill of Exceptions being now presented in due time and found to be correct.

I DO HEREBY CERTIFY that the said Bill is a true Bill of Exceptions.

Dated: May 16th, 1914.

WM. C. VAN FLEET,

United States District Judge, Northern District of
California.

Received copy of *with* Engrossed Bill of Exceptions this 13th day of May, 1914.

JOHN W. PRESTON,

United States Attorney,

FRANK HALL,

Special Ass't to Attorney General,

Attys. for *Deft.*

[Endorsed]: Filed May 16, 1914. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[714]

*In the District Court of the United States, in and for
the Northern District of California, Division
No. 2.*

No. 15,130.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. B. HAMMOND,

Defendant.

Bill of Exceptions to Order Taxing Costs.

BE IT REMEMBERED, that upon the trial of the above-entitled action a verdict was returned by the jury in favor of the plaintiff herein and thereafter judgment thereon was duly entered against defendant for the amount thereof and for costs thereafter to be taxed, and that thereafter plaintiff duly and regularly served upon defendant and filed its memorandum of costs, and that included in said memorandum of costs were the following items:

“W. E. Bennett, Great Falls, Mont., mileage
at .05¢ a mile, 460 miles, in State of
Calif.....\$23.00
O. J. Reynolds, Helena, Mont., mileage at
.05¢ a mile, 460 miles, in State of Calif.. 23.00
Sidney Mitchell, Oroville, Wash., mileage at
.05¢ a mile, 806 miles in State of Calif... 40.30
Dan Graham, Missoula, Mont., mileage at
.05¢ a mile, 460 miles in State of Calif.. 23.00
Wm. Green, Philmon Spur, Mont., mileage at
.05¢ a mile, 460 miles in State of Calif.. 23.00
J. M. Keith, Missoula, Mont., mileage at .05¢
a mile, 460 miles in State of Calif..... 23.00
R. K. McLaughlin, Mullan, Idaho, mileage at
.05¢ a mile, 460 miles in State of Calif... 23.00”

That thereafter said memorandum of costs came up duly and regularly for taxing before the clerk of the above-entitled court, and thereupon defendant objected to each and all of the items last mentioned, upon the ground that the said witnesses, referred to in [715] said items, came from without the District of Northern California, and that the only mileage which it was proper should be taxed as costs was, in the case of each of said witnesses, one hundred miles going and one hundred miles returning, or two hundred miles in all, which would result in the sum of ten dollars (\$10.00) as mileage for each of said witnesses, or in all, the sum of seventy dollars (\$70.00) for such mileage, instead of the sum of one hundred seventy-eight and 30/100 dollars (\$178.30), as set forth in said memorandum of costs.

That thereupon the clerk overruled the said objec-

tion of said defendant as to each of said items and taxed said items at the sum of one hundred seventy-eight and 30/100 dollars (\$178.30), including said sum in the total amount taxed as costs against defendant.

That thereafter, and in accordance with the rules of the court, defendant appealed from the said taxation by said clerk to the judge of the above-entitled court, making the same objection to each and all of said items as that hereinbefore noted, but that the Judge of said court sustained the taxation made by the clerk as hereinbefore set forth, taxing said items in the total sum of one hundred seventy-eight and 30/100 dollars (\$178.30), instead of in the sum of seventy dollars (\$70.00), demanded by defendant.

That the foregoing constitutes all the testimony, evidence and papers used upon the taxation of said costs by the clerk and upon the appeal from said taxation to the Court.

WHEREFORE, defendant prays that the costs as taxed against him be reduced by the sum of one hundred and eight and 30/100 dollars (\$108.30); and that the foregoing matters may more properly appear of record he proposes this as his bill of exceptions to the taxation by the clerk of the costs herein, and to the action of the court herein as aforesaid.

CHAS. S. WHEELER,

W. S. BURNETT,

Attorneys for Defendant. [716]

**Stipulation Concerning Bill of Exceptions to Order
Taxing Costs.**

IT IS HEREBY STIPULATED that the above and foregoing constitutes a full, true and correct bill of exceptions to the order of the Judge confirming the taxation by the clerk of the costs herein and to the taxation of said costs by said clerk, and that the same may be settled and allowed as correct, and that said bill of exceptions has been duly and regularly presented and settled in due time.

JOHN W. PRESTON,

FRANK HALL,

Attorneys for Plaintiff.

CHAS. S. WHEELER,

W. S. BURNETT,

Attorneys for Defendant.

Dated: Sept. 25th, 1914.

**Order Settling, Certifying and Allowing Bill of
Exceptions to Order Taxing Costs.**

The foregoing Bill of Exceptions being now presented in due time and found to be correct,

I DO HEREBY CERTIFY that the said Bill is a true Bill of Exceptions.

Dated: September 25th, 1914.

WM. C. VAN FLEET,

United States District Judge, Northern District of
California.

[Endorsed]: Filed Sep. 25, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [717]

*In the District Court of the United States, in and for
the Northern District of California, Division
No. 2.*

No. 15,130.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. B. HAMMOND,

Defendant.

Petition for Writ of Error.

A. B. Hammond, the defendant above named, feeling himself aggrieved by the verdict of the jury and the judgment entered thereon, on the 8th day of February, 1913 (and in certain rulings had in this proceeding prior thereunto, all of which will more in detail appear from the assignment of errors which is filed with this petition), whereby it was adjudged that plaintiff have and recover from the defendant the sum of fifty-one thousand and forty dollars (\$51,040.00), comes now and petitions said court for an order allowing him, said defendant, to prosecute a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Circuit, for the correction of the errors so complained of, and also that an order be made fixing the amount of the supersedeas bond which the defendant shall give and furnish upon said writ of error, and that upon the giving of such bond, all further proceedings in this court be suspended, stayed and superseded until the determination of said writ of error by the said United

States Circuit Court of Appeals, in and for the said Ninth Circuit.

And your petitioner will ever pray, etc.

CHAS. S. WHEELER,

W. S. BURNETT,

Attorneys for Defendant.

[Endorsed]: Filed Sep. 25, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [718]

In the District Court of the United States, in and for the Northern District of California, Division No. 2.

No. 15,130.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. B. HAMMOND,

Defendant.

Order Allowing Writ of Error, etc.

Upon motion of Chas. S. Wheeler and W. S. Burnett, attorneys for defendant in the above-entitled cause, and upon the filing of the petition for writ of error and assignment of errors herein:

IT IS ORDERED that the writ of error as prayed for in said petition be allowed, and that the amount of the supersedeas bond to be given by defendant upon said writ of error be, and the same is hereby fixed at the sum of Seventy-five thousand Dollars (\$75,000.00); and that upon the giving of said bond all further proceedings in this court be suspended, stayed and superseded, pending the determination of

said writ of error by the United States Circuit Court of Appeals, in and for the Ninth Circuit.

Dated: September 25th, 1914.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Sep. 25, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [719]

*In the District Court of the United States, in and for
the Northern District of California, Division
No. 2.*

No. 15,130.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
A. B. HAMMOND,
Defendant.

Assignment of Errors.

The defendant in the above-entitled action, in connection with its petition for a writ of error, alleges and avers that in the pleadings, records, proceedings trial and judgment in said action, there are manifest errors and for assignment of said errors, says:

1. The Court erred in overruling the demurrer of defendant to the complaint herein.

2. The reading to the jury after it had retired to deliberate upon its verdict, of the direct testimony, or part of the direct testimony, of a witness called on behalf of the plaintiff, namely, Thomas G. Hathaway, and at the same time denying to the defendant the right to read to the jury at said time testimony

given by said witness on cross-examination, which testimony last mentioned contradicted in many important particulars the testimony given by said witness on direct examination, and which said testimony last mentioned was so reread to the jury, upon the ground that thereby an irregularity was committed in the proceedings of the Court and jury, and an abuse [720] of discretion on the part of the Court, by which the defendant was prevented from having a fair trial, and in overruling defendant's objection thereto. (Exception No. 40.)

3. The failure of the jury to state how much, if any, of the verdict of fifty-one thousand and forty dollars (\$51,040) brought in by it against defendant, was composed of interest, the Court having instructed the jury that in fixing the amount of any verdict it might find for the plaintiff, the jury should include interest at the rate of seven per cent (7%) per annum on the value of any lumber converted from the date of such conversion to the present time, which defendant specifies as misconduct of the jury.

4. The Court erred in instructing the jury as follows:

“The defendant pleads in justification of the cutting and conversion of part of the timber in question the right so to do under the act of June 3d, 1878. That act authorizes citizens of the United States and other persons, *bona fide* residents of certain states and territories, to cut for building, agricultural, mining or other domestic purposes, any timber or trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws

of the United States, except for mineral entry, in the state of territory of which the parties cutting are residents.

“The word ‘residents’ as herein used includes domestic corporations, that is, corporations organized and existing by virtue of the laws of the State or territory wherein they are cutting and removing timber from the public domain.

“This authority is given subject to regulations authorized to be made by the Secretary of the Interior, for the protection of the remaining timber and undergrowth. Pursuant to the authority thus conferred, the Secretary of the Interior, on August 5, 1886, prescribed, among others, the following regulation:

“ ‘Every owner or manager of a sawmill, or other person felling or removing timber under the provisions of this Act shall keep a record of all timber so cut or removed, stating time when cut, names of parties cutting the same or in charge of the work, and describing the land from whence cut by legal subdivisions, if surveyed, and as near as practicable if not surveyed, with a statement of the evidence upon which it is claimed that the land is mineral in character, and stating also the kind and quantity of lumber manufactured therefrom, together with the names of parties to whom any such timber or lumber is sold, dates of sale, and the purpose for which sold, and shall not sell or dispose [721] of such timber, or lumber made from such timber, without taking from the purchaser a written agreement that the same shall not be used except for building, agricul-

tural, mining or other domestic purposes within the State or territory; and every such purchaser shall further be required to file with said owner or manager a certificate, under oath, that he purchased such timber or lumber exclusively for his own use and for the purposes aforesaid. (5) The books, files, and records of all millmen or other persons so cutting, removing, and selling such timber or lumber, required to be kept as above mentioned, shall at all times be subject to the inspection of the officers and agents of this department. (6) Timber felled or removed shall be strictly limited to building, agricultural, mining, and other domestic purposes within the State or territory where it grew.'

"The regulation just quoted is a lawful and reasonable one and imposes upon a person or corporation engaged, after its promulgation, in conducting a saw-mill, or engaged to a considerable extent in such cutting, or who makes a business of cutting timber on mineral lands and selling it, to keep the record prescribed above; and without the observance of which such cutting cannot legally be done. In this case defendant has offered no evidence tending to show a compliance with these regulations, and I accordingly instruct you that for that reason defendant has failed to bring himself within the protection of the Statute of 1878, and is not relieved of liability for any timber so cut since that regulation was adopted by reason of the fact that said lands may have been in fact mineral in character. You may, however, as indicated by the ruling of the Court during the trial, consider the evidence offered by defendant and admitted,

touching the character of the land along the Hellgate, as bearing upon the question of the good faith of those taking timber on those lands in the asserted belief that they were entitled so to do by reason of the lands being mineral in character, solely for the purpose of determining the measure of damages for such taking in the event you find the defendant responsible therefor.

“In this connection and as bearing on the question of such good faith, you will understand that the phrase ‘said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry,’ as used in the Act of June 3d, 1878, does not mean that a person is entitled to cut from the public domain merely because of the fact that there may be some known mineral lands within the vicinity of the lands from which timber is cut. Nor does the term mineral lands as here used include all lands in which minerals may be found, but only those lands where the mineral exists in sufficient quantity to pay for its extraction and known to be such at the time and to the persons cutting. If the land in question is worth more for agricultural purposes than mining it is not mineral land within the meaning of the Act, although it may contain some measure of gold or silver or other valuable minerals. This is also true of timber lands. If the lands along the Hellgate River from which a portion of the timber in question was cut were more valuable for the timber standing and growing thereon than for the minerals contained therein then such lands were not mineral in character and not subject to entry under

the then existing mineral laws of the United States, and neither the defendant nor the corporations named had a right to cut timber from such lands under the Act of [722] June 3d, 1878. These things anyone taking timber from such lands is presumed to know, and if timber is taken without actually ascertaining the character of the land, it is taken at the peril of being held responsible therefor."

To which said instruction defendant duly excepted.

(a) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that the rules and regulations of the Secretary of the Interior, referred to therein, were, or that any of them was, lawful or reasonable.

To which portion of said instruction defendant duly excepted.

(b) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it in effect instructed the jury that such rules applied to one operating under appointment or agency for another person, as was George W. Fenwick.

To which portion of said instruction defendant duly excepted.

(c) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that defendant had offered no evidence tending to show a compliance with said Rules and Regulations, and instructing the jury that for that reason defendant had failed to bring himself within the protection of the said Stat-

ute of 1878, and that defendant was not relieved of liability for any timber so cut since said Regulation was adopted, by reason of the fact that said lands might have been in fact mineral in character.

To which portion of said instruction defendant duly excepted.

(d) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury as to the meaning of the words, "Mineral Lands," as used in the [723] Act of June 3d, 1878, and particularly in that portion of the instruction wherein it stated that if the lands along the Hellgate River, from which a portion of the timber in question was cut, were more valuable for the timber standing and growing thereon than for the minerals contained therein, then such lands were not mineral in character and not subject to entry under the then existing mineral laws of the United States, and that neither defendant nor corporations named had a right to cut timber from such lands under the Act of June 3d, 1878.

To which portion of said instruction defendant duly excepted.

5. The Court erred in instructing the jury as follows:

"The defendant seeks also to justify the cutting and removing of the timber from the S. E. $\frac{1}{4}$ of Section 28, Township 14 North, Range 14 West, by reason of the fact that the same was embraced within the Homestead Entry of one Henry F. Edgar—commonly referred to in the evidence as the Edgar

Claim. The evidence shows without controversy that Edgar did not perfect the homestead right so initiated and did not receive a patent for said lands, but that the same reverted to the United States and the said Edgar lost all of his rights in the land and the timber growing thereon at the time of the initiation of his entry. In this connection you are instructed that a settler on public land covered by an unperfected homestead entry who cuts and removes timber therefrom, other than for necessary buildings and improvements and clearing for cultivation, is in law a willful trespasser, without regard to the question of his good faith in making the entry, and if you find that the defendant, or any of the corporations or persons associated with him, acting under his direction and control, cut and converted the timber in question from the S. E. $\frac{1}{4}$ of said Section 28, whether with the consent of Edgar or not, then the defendant is liable for the full value of the timber so cut and carried away at the time it was sold.”

To which said instruction defendant duly excepted.

(a) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that a settler on public land covered by an unperfected homestead entry who cuts and removes timber therefrom, other than for necessary buildings and improvements, is in law a willful [724] trespasser, without regard to the question of his good faith in making the entry.

To which portion of said instruction defendant duly excepted.

(b) The Court erred in that portion of the instruction last hereinabove quoted and set forth, wherein it instructed the jury that if defendant was liable for all or any part of the timber cut and removed from the so-called Edgar Claim, then that he was liable for the full value of the timber so cut and carried away at the time it was sold, in that thereby the court took away from the jury the question whether or not the stumpage value of the timber so cut and removed might not be the measure of defendant's liability in damages.

To which portion of said instruction defendant duly excepted.

6. The Court erred in instructing the jury as follows:

“The defendant further sets up in his answer that the cutting and removing of the timber from the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of Section 18, Township 14 North, Range 15 West, was authorized by a permit issued by the Secretary of the Interior on January 16, 1892, to the Blackfoot Milling & Manufacturing Company under and by virtue of the provisions of the Act of March 3, 1891, which permit was afterwards transferred to the Big Blackfoot Milling Company. The permit so issued was made subject to certain conditions, restrictions and limitations therein set forth and which have been read to you. The Act provides that the Secretary of the Interior may designate the sections or tracts of land and prescribe the conditions, limitations and

restrictions under which the cutting shall be carried on. In this instance, as stated, the Secretary of the Interior did prescribe the conditions, restrictions and limitations under which said corporations could cut timber from the lands last above described by inserting them in the permit itself. These conditions, restrictions and limitations were reasonable, and it was the duty of those acting under such permit to comply therewith. If you find that the said corporations named, acting under and through the direction and control of the defendant, cut and removed the timber from the lands last described without complying with the conditions, restrictions and limitations embodied in said permit, then neither they nor the defendant acquired any right whatsoever in and to the timber so cut and removed, but such cutting was a trespass and the plaintiff is entitled to recover for the value of such timber if converted as alleged. Moreover, it was the duty of those cutting under said permit to know and ascertain [725] the lines bounding the land from which they were entitled to cut timber thereunder, and the fact that they may have misapprehended their rights under such permit will not justify a cutting outside such lines, nor will it mitigate the damages resulting therefrom. In other words, although the jury may find that defendant or those under his direction cut outside of the lands included in such permit under the mistaken belief that the permit included the lands from which they did cut, they would in law, as to the lands outside of this permit, be trespassers and liable to the plaintiff for

the value of any timber so cut.”

To which said instruction defendant duly excepted.

(a) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that the burden of proof rested upon the defendant to establish that the cutting and removal of the timber had been done in accordance with the conditions, restrictions and limitations contained in the permit mentioned in said instruction.

To which portion of said instruction defendant duly excepted.

(b) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that the fact that those cutting under the permit, referred to in said instruction, may have misapprehended their rights thereunder would not mitigate damages resulting therefrom, and that they would be liable for the value of any timber so cut. The Court thereby took away from the jury the question whether or not the stumpage value of the timber so cut and removed might not be the measure of defendant's liability in damages.

To which portion of said instruction defendant duly excepted.

7. The Court erred in instructing the jury as follows:

“But if you find that the taking was wrongful, as is necessary in order to hold the defendant responsible, and that the manner of the taking was such as to enhance the difficulty of the plaintiff in establishing

the exact extent of its wrong, then the law authorizes you to indulge every fair and reasonable inference justified by the circumstances in fixing the amount which [726] the plaintiff has suffered. The proof should tend to establish the amount of damage with comparative or reasonable certainty, but it need not be shown with that precise exactitude which would be required under other circumstances. This is because the law will not permit a defendant to profit by reason of the fact that by his wrongful act he has made the establishment of the exact extent of the injury done difficult of proof. This does not mean that the plaintiff must not prove the extent of his damage, but he is only required in such a case to afford the jury a basis of reasonable certainty for its verdict. Such reasonable basis, however, the evidence must furnish, since you are not permitted to guess or speculate as to the amount of your verdict. If the evidence leaves the question of plaintiff's damage so entirely uncertain that the jury are wholly unable to determine it, then, even though you find the defendant responsible, the plaintiff cannot recover beyond nominal damages."

To which said instruction defendant duly excepted.

(a) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that the manner of the taking of the timber by defendant might have been such as to enhance the difficulty of the plaintiff in establishing the exact extent of its wrong, and that in such a case a less degree of certainty in establish-

ing the extent of plaintiff's damage is required than otherwise.

To which portion of said instruction defendant duly excepted; and defendant assigns the giving of such portion of said instruction as error as an abstract proposition of law, and furthermore, in any event inapplicable to the evidence, there being no evidence whatsoever that the manner of the taking of the timber was such as to enhance the difficulty of the plaintiff in establishing the exact extent of the wrong committed upon it, and, therefore, to permit a recovery of damages on proof less certain as to the extent of such damages than would otherwise be required.

8. The Court erred in instructing the jury as follows:

"It is alleged in the complaint that the value of the timber from which the lumber sued for was cut, while standing on plaintiff's land, was one dollar per thousand feet, board measure; that its value when felled and ready for sawing was five dollars per thousand feet; and that when manufactured into lumber its [727] value was ten dollars per thousand feet, like measure; and it is alleged that the value of the whole quantity of lumber taken and appropriated by defendant was the total sum of \$211,854.10. But should you find that plaintiff is entitled to recover you will fix the value of the lumber taken from the evidence according to the rule or measure of damages hereinafter stated to you, and determine the amount of your verdict therefrom. The value alleged is merely the plaintiff's estimate,

and that is always subject to control by the evidence in the case.

“If, under the principles I have stated, you find that the defendant, or any of the corporations named acting under his direction and control, knowingly and wilfully cut and converted the timber mentioned in the complaint, or any part thereof, then the plaintiff is entitled to recover the market value of the timber so converted in whatever condition or form it may have been at the time of its disposal or sale.”

To the giving of which said instruction defendant *defendant* duly excepted; and defendant avers that said instruction was erroneous as an abstract proposition of law, in this, that thereby the jury was instructed that it might allow damages against defendant, if in fact any damages were found by it to be recoverable, computed at the market value of the timber so converted in whatever condition or form it may have been at the time of its disposal or sale, even though he did not know that the corporations named, acting under his direction and control, had knowingly and willfully cut and converted the timber mentioned in the complaint, or any part thereof, and even though defendant did not know anything whatsoever about such cutting and conversion; and, further, that said instruction was erroneous as inapplicable to the evidence in the cause, there being no evidence whatsoever to show that defendant knew, or should have known, or had knowledge or notice, of the facts, or any of them, concerning the alleged cutting and conversion; and that there was no evidence whatsoever to justify the finding that defendant, in

the conversions complained of, acted willfully, maliciously, or was conscious of any wrong-doing on his part, and that thereunder defendant should not be held liable for damages based upon a [728] higher value of the timber converted than its stump-age value, to wit, the sum of one dollar (\$1.00) per thousand feet.

9. The Court erred in instructing the jury as follows:

“If you find that the defendant, or any of said corporations while acting under his direction and control, converted the timber mentioned in the complaint, or any part thereof, under the honest but mistaken belief that he or they had the right under the law to cut and remove such timber, then in assessing the damages you will fix the value of the same at the time of conversion less the amount which was added to its value before sale; in other words, if you find that timber was so cut and removed from lands of complainant and that there was added thereto certain value by reason of the manufacturing of said timber into lumber for the market, then the measure of damages will be the difference between the expenses incurred in the manufacturing of said lumber and the price for which it was sold in the market.”

To which said instruction defendant duly excepted; and defendant avers that said instruction was erroneous as an abstract proposition of law and inapplicable to the case, inasmuch as under the pleadings the plaintiff alleged that the value of the timber alleged to have been converted while in place in the stump, did not exceed one dollar (\$1.00) per

thousand feet, and that plaintiff was thereby limited to such value as the basis for computing the value of the timber taken on the theory of an innocent trespass, and was, furthermore, inapplicable to the case, inasmuch as there was no evidence whatsoever as to what was the cost of manufacturing the timber into lumber, or what was the value added to said timber by reason of manufacturing the same into lumber, and that, therefore, there was no basis from which the jury could determine, under the instructions of the court, any other value of the timber converted than that based upon the value of the tree in place, namely, not to exceed one dollar (\$1.00) per thousand feet, board measure.

10. The Court erred in instructing the jury as follows:

“In fixing the amount of any verdict you may find for the plaintiff, you should include interest on the value of any lumber so converted from the date of such conversion to the present time.” [729]

To which said instruction defendant duly excepted; and defendant avers that the giving of said instruction was erroneous, in that, so long a period of time had elapsed between the commission of the act or acts of conversion complained of and the bringing of said action, there being no adequate, or any, explanation, justification, or excuse for such delay; and, further, in that the Court failed to instruct the jury that its finding of the amount of interest, if any, should be separate and segregated from its finding as to damages, if any, exclusive of interest.

11. That the Court erred in giving any charge to

the jury which would permit of a recovery against defendant in excess of the sum of sixteen thousand dollars (\$16,000.00).

12. That the Court erred in giving any charge to the jury which would permit of a recovery against defendant in excess of the sum of sixteen thousand dollars (\$16,000.00), with interest thereon at the rate of seven per cent (7%) per annum from the time, or times, of the conversion, or conversions, until the close of the trial of said action.

13. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“I instruct you that the evidence offered in this case is not sufficient to justify the rendition of a verdict against the defendant in this action, and therefore I direct you that you return a verdict in favor of the defendant.”

To the failure and refusal of the court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction VI.) And defendant specifies as several and separate grounds wherein the Court erred in failing and refusing to give said proposed instruction last mentioned, the following:
[730]

(a) That there is no evidence whatsoever to justify a finding that any act of conversion was ever committed by any one.

(b) That there is no evidence to justify a finding that defendant is liable for any conversion that may have been established by the evidence.

(c) That there is no evidence to justify a finding that defendant personally directed, or participated

in, the acts of conversion, or any of them, alleged in the complaint herein, or that may have been proved upon the trial.

(d) That there is no evidence to justify a finding that defendant entered into a plan or conspiracy, or conspired, with any one to commit or cause to be committed the acts of conversion, or any of them, alleged in the complaint herein, or that may have been proved upon the trial.

(e) That there is no evidence to justify a finding that defendant aided or abetted in the commission of the acts of conversion, or any of them, which the jury may have found to have been committed.

(f) For that the uncontradicted evidence established that all of the timber alleged in the complaint, or proved upon the trial, as being cut down, felled, and removed, and manufactured into lumber and appropriated, used, sold and converted by defendant, or by any joint tort-feasor of defendant, or anyone for whose acts defendant is responsible, was cut and removed from the public timber lands of the United States by persons then citizens and residents of the state or territory of Montana, for agricultural, mining, manufacturing or domestic purposes, and was actually used for such purposes and not transported out of the said state or territory of Montana, and that at the time mentioned [731] in the complaint herein, there were no regulations made or prescribed by the Secretary of the Interior respecting said matter.

14. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“In order to maintain this action, the plaintiff must prove that the timber in question was its property, and that while it was the property of the plaintiff it came into the possession of the defendant who converted it. If you find that the defendant never came into possession of the timber, and never purported to assume or assumed control over it, then your verdict must be for the defendant.”

To the failure and refusal of the court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction III.)

15. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“I instruct you that, even if you find that timber was converted, and that the proceeds derived from the sale of the same were paid over to the Missoula Mercantile Company in payment of debt, that this circumstance would not of itself render either the Missoula Mercantile Company, or any of its officers or stockholders, liable. Before the defendant Hammond can be held liable for conversion of such timber, he must have personally planned or have personally directed the cutting of the particular timber converted, or he must have dealt personally, or through agents personally directed by him, with the possession or disposition of such timber after it was cut.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction IV.)

16. The Court erred in failing and refusing to in-

struct the jury as requested by defendant as follows:

“If you find that any of the timber, for the conversion of which this action is brought, belonged to the United States, and was converted by Henry Hammond, G. W. Fenwick, or Fred Hammond, the Montana Improvement Company, the Blackfoot Milling and Manufacturing Company, or the Big Blackfoot Milling Company, and that, pursuant to the instructions of said persons or corporations, or either of them the purchase price which was received for such timber so converted was paid to any corporation [732] in which the defendant was a stockholder or officer, yet, as matter of law, I instruct you that this does not entitle the plaintiff to maintain this action against the defendant, nor does this constitute a conversion by defendant of the plaintiff’s property.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant’s Proposed Instruction V.)

17. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“I instruct you that conversion consists in an act of willful interference with any chattel without lawful justification, whereby the person entitled thereto is deprived of possession of it. The chattels for the conversion of which this action is brought consist of timber or lumber claimed to be owned by the United States, and if you find that the United States did own this timber, or lumber, yet, as matter of law, if the defendant in this case did not interfere with the possession of the United States in or to the timber

or lumber, for the conversion of which this action is brought, then your verdict must be for the defendant.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant’s Proposed Instruction VII.)

18. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“The burden of proof is on the plaintiff not only to establish by a preponderance of the evidence that timber has been unlawfully taken from the lands involved in this controversy, or from some portion thereof, but it is also incumbent upon the plaintiff to show, by a preponderance of the evidence, by whom the same was taken, and the quantity thereof, and I instruct you that, even if you should be satisfied from the evidence that timber had been unlawfully converted, and that the defendant was responsible therefor, nevertheless, if, from the evidence, you are unable to ascertain the quantity or extent of the timber taken, your verdict must be for the defendant, and, in this same connection, I instruct you that you are not permitted to guess at the quantity taken or to speculate as to the amount. You must, in such case, find a basis, in the preponderance of the evidence, for your computation in computing the amount of timber taken.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant’s Proposed Instruction IX.) [733]

19. The Court erred in failing and refusing to

instruct the jury as requested by defendant as follows:

“A. B. Hammond appears to have been a director of the Big Blackfoot Milling Company, and a stockholder therein. It is admitted by the defendant here that one Boyd, while employed by the corporation, entered upon a certain eighty acres of land in section 22, township 14 north, range 14 west. Now, although this act may have been innocent, the corporation which employed Boyd would be responsible for the taking, even though it had given Boyd express directions to be careful and to keep within the lines of the property upon which the corporation had a right to cut, and even though it was entirely ignorant that Boyd had gone beyond those lines on to property of the Government. But the question for you to decide is not whether the corporation would be responsible, but would A. B. Hammond be responsible, and, in such connection, I instruct you that A. B. Hammond would not be responsible unless he had personally participated in directing Boyd to cut this particular timber, or unless, after the timber was cut, he had personally participated in its possession, sale, or disposition. Even a knowledge upon A. B. Hammond’s part that Boyd was an employee of the corporation and was cutting timber for the corporation would not of itself be sufficient to justify a verdict against the defendant. Before the defendant can be held liable for Boyd’s cutting, the defendant must in some manner have actually participated in the unlawful act of Boyd.”

To the failure and refusal of the Court to give said

instruction, defendant duly excepted. (Defendant's Proposed Instruction X.)

20. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

"If you believe from the evidence that Henry Hammond, during the period while the Edgar Claim was cut, was the sole owner of the Bonner Mill, and that the defendant did not participate in the cutting of the timber from said claim, or in the manufacture of it into lumber, or in the sale or disposition thereof, then I instruct you that the defendant would not be liable for the conversion of said timber."

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction XI.)

21. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

"If you find from the evidence that timber was cut from Lot 10 in Section 18 by the Big Blackfoot Milling Company at [734] a time when said corporation had a permit to cut over the adjoining property, and over a very large area of the public domain in addition thereto, and if you find that the said timber was cut contrary to the directions of the said corporation, by some of its employees, then I instruct you that the said corporation nevertheless would be liable for the taking thereof. But again the question arises: Would the defendant, A. B. Hammond, a director and stockholder in the said corporation, be personally liable? The answer is that he would not be liable unless you find from the evidence that he personally participated in the taking of the said tim-

ber. If he knew nothing of the taking thereof, and took no personal part therein, he would not be liable, although the corporation in which he was a stockholder and director would be liable.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant’s Proposed Instruction XII.)

22. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“Before you can hold the defendant liable for the conversion of any timber that may have been taken from public lands and sawed at the Bonita Mill from the Hellgate country, it will be necessary for you to find either that A. B. Hammond was a principal or an agent in the acts of trespass from which the conversion has resulted. If you find that A. B. Hammond at no time had any interest, either direct or indirect, in the Bonita Mill while the same was operated by Fred A. Hammond or George W. Fenwick, and that he did not in any manner participate in the cutting of the timber, or in the manufacture and sale thereof, then I charge you that A. B. Hammond is not legally liable for the taking thereof.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant’s Proposed Instruction XIII.)

23. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“If you find from the evidence that the Montana Improvement Company erected the Bonita Mill and sold the same to Fred A. Hammond, and that Fred A. Hammond in turn sold the same to George W.

Fenwick, and that from and after the time of the said sale neither the Montana Improvement Company nor the defendant, A. B. Hammond, had any interest whatsoever in the said mill, then I charge you that the said Montana Improvement Company would not be liable unless it were shown by a preponderance of the evidence that prior to the sale to Fred A. Hammond it had cut logs upon some portion of the land involved in this action. Whether or not there is any evidence in the record to the effect that the Montana Improvement Company ever cut any logs, is a [735] question for the jury. But even if the Montana Improvement Company should be found by you so to have cut timber, then the defendant would not be liable for such cutting merely because he was the owner of a portion of the stock of the Montana Improvement Company or was an officer thereof. As already said to you, in the case of a corporation a stockholder or officer is not personally liable in conversion merely because he is a stockholder or officer. He is liable only in case he has himself personally participated in the conversion, and then he is held liable in law not because of the fact that he is a stockholder or officer; that fact has nothing to do with the question. He is liable in such case because of his personal participation in the conversion."

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction XIV.)

24. The Court erred in permitting the witness William Greene to answer the question as follows:

“From your experience as a scaler of timber, can you judge from what you observed on section 18 there, which portion of the section had been cut first?” by saying: “On the southeast quarter of these lots.” And in overruling defendant’s objection thereto upon the ground that it was incompetent, irrelevant and immaterial. (Exception No. 1-A.)

25. The Court erred in permitting the witness William Green to answer the question as follows: “From your experience, can you tell the time that had elapsed between the first cutting and the second cutting?” by saying: “Well, in my judgment, it would be somewhere about five or six years.” And in overruling defendant’s objection thereto upon the ground that it was incompetent, irrelevant and immaterial. (Exception No. 1-B.)

26. The Court erred in denying defendant’s motion to strike out the testimony of the witness William Greene and conclusions made by him concerning the amount of timber testified to by the witness as having been cut and taken from lands described in the complaint; upon the ground that such testimony and conclusions [736] were hearsay, irrelevant, incompetent and immaterial, and to which ruling of the Court defendant duly excepted. (Exception No. 1-C.)

27. The Court erred in permitting the witness, John M. Keith, to answer the question as follows: “And is it not also true that if the Missoula Mercantile Company had not carried Mr. Greenough he could not have carried on those operations?” by saying: “I think that is true of many of them in those days;

there were very few persons then who had any amount of means''; and in overruling defendant's objection thereto, upon the ground that it was incompetent, irrelevant and immaterial and not cross-examination. (Exception No. 2.)

28. The Court erred in overruling the question propounded by defendant to the witness, William H. Hammond, as follows: "At the time that you made this purchase, was it an out and out straight business transaction, whereby it was intended that the title, both legal and equitable, should pass to you, or was it intended and agreed among you that you should take title and hold it for some other concern, person or corporation?" defendant thereby intending to elicit, and would have elicited, from the said witness an answer to the effect that said transaction was an out and out straight business transaction and that it was intended that he should take the title, both legal and equitable, for his own use and benefit, and in sustaining plaintiff's objection to said question, upon the ground that it was leading and suggestive, and upon the further ground that the instrument speaks for itself as to what it is. (Exception No. 3.)

29. The Court erred in refusing to permit the document bearing date February 10, 1888, purporting to be a lease between the Blackfoot Milling and Manufacturing Company, as lessor, and [737] William H. Hammond, as lessee, to be offered in evidence, defendant offering said document as the document under which the said William H. Hammond took possession of the leased premises, and in sustaining plaintiff's objection thereto for the reason

that the document does not bear on its face any authority from the Blackfoot Milling and Manufacturing Company for its execution; that it is merely signed by the president; that it is not acknowledged before a notary public and that it is an instrument affecting the right of possession to real property for more than one year; that there is nothing to show that it is the instrument that it purports on its face to be; in other words, the instrument purporting to be executed by the Blackfoot Milling and Manufacturing Company does not bear the seal of that Company. (Exception No. 4.)

30. The Court erred in refusing to allow the witness, William H. Hammond, to answer the following question: "I now ask you to state from your recollection, what the terms of the instrument were that you had a duplicate of, that purported to be a lease?" defendant arguing that it was the document under which the said William H. Hammond took possession of the Bonner Mill, and further contending that it went to the question of his good faith in everything he did, and in sustaining the objection of plaintiff to the question, for the reason that the instrument itself would be the best evidence of its terms. (Exception No. 5.)

31. The Court erred in refusing to permit the witness, William H. Hammond, to answer the question as follows: "While you were operating the property under that lease that you have testified to, state how much rental you paid," for the purpose of showing the *bona fides* of the transaction, and in sustaining the objection of the plaintiff to said question, on the

[738] ground that the lease itself should be the best evidence of the amount of rental that was to be paid. (Exception No. 6.)

32. The Court erred in refusing to permit the witness, William H. Hammond, to answer the following question: "To whom did you pay rental?" which, had the witness been permitted to answer same, he would have stated that he paid rental therefor to the lessor, Blackfoot Milling and Manufacturing Company, thereby tending to establish the *bona fides* of the transaction under which he became and continued to be lessee of said property, and in sustaining the objection of plaintiff to said question on the ground that the lease itself should be the evidence of the person to whom the rental was paid. (Exception No. 7.)

33. The Court erred in refusing to permit the witness, William H. Hammond, to answer the following question: "Was there any provision of any kind for the extension of the original lease which you have mentioned?" defendant thereby intending to show, and the said witness would have stated, that there was such provision and that such provision was inserted as part of the consideration moving to him for his transfer to the said Blackfoot Milling and Manufacturing Company of the said property which he had theretofore owned in severalty and absolutely, and thereby evidence would have been furnished tending to establish the original *bona fide*, absolute and several ownership of the said witness of said property and of the *bona fide* character of the transfer by him of said property to said Black-

foot Milling and Manufacturing Company and of the lease that was made to him by said Company, and in sustaining the objection interposed by plaintiff to said question, on the ground that it called for the giving of the provisions of the [739] lease. (Exception No. 8.)

34. The Court erred in refusing to permit the witness, William H. Hammond, to answer the question propounded to him by defendant as follows: "Mr. Hammond, state whether or not while engaged in the logging business in the State of Washington you obtained credit from any mercantile concern?" defendant thereby intending to, and would have, elicited from the witness an answer to the effect that he had obtained such credit, and in sustaining the objection of plaintiff to said question, on the ground that it was irrelevant, incompetent and immaterial as to any custom that existed in some other State at a time prior to the time in question. (Exception No. 12.)

35. The Court erred in refusing to permit the witness, William H. Hammond, to answer the question propounded to him by defendant as follows: "State whether or not while in business in Washington it was your custom to give orders upon any mercantile house in payment of your men," by which question it was intended to elicit the fact that it was, and that, therefore, there was nothing sinister in the following of the same practice at a later date, as indicating any undue or other relationship than that of debtor and creditor between defendant or the Missoula Mercantile Company, on the one hand, the said witness, on the other; and in sustaining plaintiff's objection

to said question, on the ground that it was irrelevant, incompetent and immaterial as to any custom that existed in some other State at a time prior to the time in question. (Exception No. 13.)

36. The Court erred in denying the admission in evidence of those two certain affidavits, dated November 21, 1885, and purporting to have been made by H. A. Ameraux and William H. [740] Smith, which the witness, G. W. Fenwick, identified as having been seen by him before he made his purchase of the Bonita Mill; each of the said affidavits, in substance, sets forth that affiant was familiar with the country lying along the line of the Northern Pacific Railroad between the Town of Missoula and the Town of Bearmouth, in the Territory of Montana; and that he was enabled to testify understandingly with regard thereto; that said land was mineral in character and not subject to entry under existing laws of the United States as agricultural land, and that to his certain knowledge there were many mineral locations, leads, lodes and ledges bearing gold, silver and other precious metals; and that within said limits and near said railroad there was an organized mining district, in which were a number of mines then being worked for precious metals; and that said country and lands were essentially mineral land and unfit for agricultural lands, and were not chiefly valuable for the timber thereon; defendant thereby intending to show the good faith, and basis for the good faith, of the said G. W. Fenwick in his belief that the lands upon which he cut timber were mineral lands, upon which he might rightfully cut timber.

under the provisions of the Act of Congress of June 3, 1878; and in sustaining the objection of the plaintiff to the admission in evidence of said affidavits, for the reason that they were, and each of them was, wholly irrelevant, incompetent and immaterial, and on the further ground that each is an *ex parte* affidavit and an attempt to introduce evidence as to the mineral character of the lands in question under conditions when the plaintiff in this case has had no opportunity to examine or cross-examine the witness testifying as to the mineral character of the land. (Exception No. 13-A.) [741]

37. The Court erred in refusing to permit the witness, G. W. Fenwick, to answer the question put to him by defendant as follows: "What acts, if any, of management of the Bonita Mill property on the Hellgate, did Mr. A. B. Hammond exercise during the time that you have testified to, from your purchase in 1886 until the time that you gave up the mill?" defendant thereby intending to elicit from the witness, and the witness would have testified, that the said A. B. Hammond did not exercise any acts whatsoever of such management at any time; and in sustaining the objection of plaintiff to said question, on the ground that it called for the conclusion of the witness. (Exception No. 14.)

38. The Court erred in refusing to permit the witness, G. W. Fenwick, to answer the question propounded to him by defendant as follows: "State whether or not demand was ever made upon you by any officer of the federal Government for an inspection of your books or records at any time during the

time that you were operating this property," by which it was intended to elicit, and the said witness would have testified, that no such demand had been made; and in sustaining the objection of plaintiff to said question, on the ground that it was irrelevant, incompetent and immaterial. (Exception No. 15.)

39. The Court erred in requiring the defendant, A. B. Hammond, as a witness, to answer the question propounded, upon cross-examination, by plaintiff to him, as follows: "How much did you ultimately realize from the sale of your interest in the Blackfoot Milling and Manufacturing Company, the Big Blackfoot Milling Company, the Montana Improvement Company and the Missoula Mercantile Company?" by saying: "Well, so far as the Montana Improvement Company is concerned, I came out [742] at the little end of the horn. I never got anything out of it. I lost what I put in. The Blackfoot Milling and Manufacturing Company was a transfer of stock. I received stock in the Big Blackfoot Milling Company; that was really in effect a transfer of the Blackfoot Milling and Manufacturing Company to the Big Blackfoot Milling Company, and I received stock in that transfer; and in overruling defendant's objection to said question, on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it was an incompetent inquiry as to the private affairs of a citizen upon cross-examination, which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 16.)

40. The Court erred in requiring the defendant,

A. B. Hammond, as a witness upon cross-examination, to answer the question propounded to him by plaintiff, as follows: "From the Big Blackfoot Milling Company, how much did you ultimately receive out of it?" by saying: "I got my *pro rata* out of the sale of the Big Blackfoot Milling Company. I could not say off-hand what it amounted to, but I think it was as much as my brother got"; and in overruling defendant's objection to said question on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it was an incompetent inquiry as to the private affairs of a citizen upon cross-examination which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 17.)

41. The Court erred in requiring the defendant, A. B. Hammond, as a witness upon cross-examination, to answer the question as follows: "What was the value of your stock when [743] you transferred your interest in the Missoula Mercantile Company?" by saying: "That is a matter of opinion. It did not increase very much. I got six per cent dividends on my stock in the Missoula Mercantile Company. I took stock in another corporation"; and in overruling the objection of defendant to said question on the ground that it was irrelevant, incompetent and immaterial and not cross-examination and that it was an incompetent inquiry as to the private affairs of a citizen upon cross-examination which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 18.)

42. The Court erred in requiring the defendant,

A. B. Hammond, as a witness, upon cross-examination, to answer the following question: "What is your estimate of its value (the value of the holdings of shares of stock by witness in the Missoula Mercantile Company) at the time of your disposition of it?" by saying: "I do not consider that it depreciated any. It was worth as much as it was originally worth, if not more"; and in overruling the objection of defendant to said question, on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it was incompetent inquiry as to the private affairs of a citizen upon cross-examination which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 19.)

43. The Court erred in requiring the defendant, A. B. Hammond, as a witness, upon cross-examination, to answer the question as follows: "Can't you give it to me in dollars and cents so we can get it into the record?" by saying: "I should judge it was worth at least two hundred and fifty or three hundred thousand dollars"; and in overruling the objection of defendant [744] to said question on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it was an incompetent inquiry as to the private affairs of a citizen upon cross-examination which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 20.)

44. The Court erred in permitting the witness, George B. Archibald, to answer the question as follows: "You may state the examination you made of

each section separately and what you found upon it and your conclusions as to the mineral or nonmineral character of the ground," by saying: "Starting in with section 10, township 11 north, range 16 west, as to the north half of the northwest quarter and the northwest quarter of the northeast quarter, I found that most all of those three forties were sandstone, with a little lime in the extreme northeast quarter, and there was no excavation of any nature there, absolutely nothing to indicate the land having any value for mineral purposes. The formation dipped to the southwest, and as I said, there was no excavation of any kind, nor anything to indicate the mineral character. The sandstone is not mineralized. Then take the south half of the southeast quarter of section 10 and the northeast quarter of the southeast quarter of section 10, the same township and range, I found that the northeast quarter of the southeast quarter was entirely underlain with sandstone, and in the southeast quarter of the southeast quarter, practically the whole forty was covered with diabase. Diabase is an igneous rock, consisting of plagioclase and feldspar. It may contain minerals. That rock in this particular place did not contain minerals. In the other forty, that was underlain mostly with valley alluvium, and the formation [745] in places does not show for that reason"; and in overruling the objection of defendant interposed to said question, upon the ground that it was irrelevant, incompetent and immaterial and not rebuttal. (Exception No. 21.)

45. The Court erred in permitting the witness,

George B. Archibald, to answer the question as follows: "I wish you would state whether or not you found any minerals, or whether the rock is of such a character as usually bears minerals?" by saying: "The only possible place in any of this ground that I have described, was over in section 10 where I would expect to find any mineral and that would be in the diabase. For that reason, we examined that very thoroughly and found several broken, fractured zones. I went so far as to have assays made of that rock and got absolutely nothing from it"; and in overruling the objection of defendant interposed to said question, upon each and all of the ground as stated and set forth in the last assignment of error herein, to wit, assignment 44. (Exception 22.)

46. The Court erred in permitting the witness, Oscar J. Reynolds, to answer the question as follows: "Did you find any indications of mineral on said section 14?" by saying: "I did not"; and in overruling the objection of defendant interposed to said question, upon each and all of the grounds as stated and set forth in said assignment of error 44 herein. (Exception No. 27.)

47. The Court erred in permitting the witness, Oscar J. Reynolds, to answer the question as follows: "Did you find any indication of mineral on section 12, township 11 north, range 16 west?" by saying: "On the southwest quarter of the southwest quarter, there was a fractured zone there in [746] igneous material that showed iron stains, but I do not believe it would be considered mineral in character"; and in overruling the objection of defendant interposed

to said question, upon each and all of the grounds as stated and set forth in said assignment of error 44 herein. (Exception No. 29).

48. The Court erred in permitting the witness, Oscar J. Reynolds, to answer the question as follows: "Did you find any indication of mineral in section 8, township 11 north, range 15 west?" by saying: "No, sir, I did not"; and in overruling the objection of defendant interposed to said question, upon each and all of the grounds as stated and set forth in said assignment of error 44 herein. (Exception No. 30.)

49. The Court erred in permitting the witness, Oscar J. Reynolds, to answer the question as follows: "Did you examine section 18, township 11 north, range 15 west?" by saying: "I did, and saw nothing there to indicate that it was mineral in character"; and in overruling the objection of defendant interposed to said question, upon each and all of the grounds as stated and set forth in said assignment of error 44 herein. (Exception No. 31.)

50. The Court erred in granting the motion of plaintiff to amend the complaint on file herein on its face, by adding to the last line of the prayer of said complaint: "And for interest thereon"; and in overruling the objection made by defendant to the allowance of such amendment. (Exception No. 39.)

51. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment book of the County of Missoula relating to the assessment of Missoula Mercantile Company for the year 1891, marked "Plaintiff's Exhibit No. 5," over the objection of defendant that the same was incompe-

tent, irrelevant, immaterial, hearsay and *res inter alios acta*, and [747] from which it appeared that the Bonner Mill property was assessed to the Missoula Mercantile Company and that the Florence Hotel and Eddy Block, and also the Hammond Block, were assessed to said Missoula Mercantile Company. (Exception No. 01-A.)

52. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of Missoula Mercantile Company for the year 1892, marked "Plaintiff's Exhibit No. 6," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta*, and from which it appeared that the Bonner Mill property was assessed to the Missoula Mercantile Company and that the Florence Hotel and Eddy Block and also the Hammond Block, were assessed to Missoula Mercantile Company. (Exception No. 01-B.)

53. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of Missoula Mercantile Company for the year 1893, marked "Plaintiff's Exhibit No. 7," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta*, and from which it appeared that the Bonner Mill property was assessed to the Missoula Mercantile Company, and that the Florence Hotel and Eddy Block, and also the Hammond Block, were assessed to Missoula Mercantile Com-

pany. (Exception No. 01-C.)

54. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula relating to the assessment of Missoula Mercantile Company for the year 1894, marked "Plaintiff's Exhibit No. 8," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta*, and [748] from which it appeared that the said Bonner Mill property, the Florence Hotel and Eddy Block, Eddy residence, E. L. Bonner residence, "W. H. Hammond residence \$2500 and "W. H. Hammond, Levasseur house \$400" were assessed to the Missoula Mercantile Company. (Exception No. 01-D.)

55. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of Missoula Mercantile Company for the year 1890, marked "Plaintiff's Exhibit No. 9," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta*, and from which it appeared that 6,750,000 feet of lumber and 4,000,000 feet of logs were assessed to Missoula Mercantile Company, and that the Florence Hotel and Eddy Block were assessed to Missoula Mercantile Company. (Exception No. 01-E.)

56. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of Missoula Mercantile Company for the

year 1890, marked "Plaintiff's Exhibit No. 10," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta*, and from which it appeared that the Bonner Mill property was assessed to Missoula Mercantile Company and that the Florence Hotel and Eddy Block, and also the Fowler Mill, the Tyler Mill, the McClain Mill and the Silver Thorn Mill and outfit, were assessed to Missoula Mercantile Company. (Exception No. 01-F.)

57. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of the Missoula Mercantile Company for the year 1895, marked "Plaintiff's Exhibit No. 11," over the objection of defendant that the same was incompetent, [749] irrelevant, immaterial, hearsay and *res inter alios acta*, and from which it appeared that the Bonner Mill property was assessed to the Missoula Mercantile Company, and that the Hammond Block, Florence Hotel and Eddy Block, and Eddy residence; also "W. H. Hammond residence \$2500" and "W. H. Hammond, Levasseur house \$400," were assessed to Missoula Mercantile Company. (Exception No. 01—G.)

58. The clerk of the court and the Court erred in taxing and the Court erred in confirming the taxation of costs herein made by the clerk in this, that the mileage, amounting in all to the sum of one hundred seventy-eight and 30/100 dollars (\$178.30), of seven certain witnesses coming from without the Northern District of California, was computed upon

the mileage actually and necessarily traveled by said witnesses within said District, whereas the proper mode of computation was to allow *to* to exceed one hundred miles going and returning for each witness, that is to say, not to exceed ten dollars (\$10) for each of said witnesses, which would amount in the aggregate to the sum of seventy dollars (\$70), thereby decreasing the amount of said item in the sum of one hundred eight and 30/100 dollars (\$108.30).

WHEREFORE, defendant prays that the said judgment may be reversed and that a new trial be granted.

A. B. HAMMOND,
By CHAS. S. WHEELER,
And W. S. BURNETT,

His Attorneys.

[Endorsed]: Filed Sep. 25, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [750]

*In the District Court of the United States in and for
the Northern District of California, Division
No. 2.*

No. 15,130.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. B. HAMMOND,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, A. B. Hammond, as principal, and Mary P. Fenwick and William H. Hammond, as sureties, are held and firmly bound unto plaintiff in the above-entitled action in the sum of Seventy-five Thousand (\$75,000.00) Dollars, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, representatives, executors, administrators and assigns, firmly by these presents:

Sealed with our seals and dated this 25th day of September, 1914.

WHEREAS, the above-named defendant, A. B. Hammond, has sued out a Writ of Error in the United States Circuit Court of Appeals, in and for the Ninth Circuit, to reverse the judgment entered in the above-entitled action, in favor of the plaintiff therein and against the defendant therein, for the sum of Fifty-one Thousand and Forty (\$51,040.00) Dollars, interest and costs;

NOW, THEREFORE, the condition of this obligation is such, that if the above-named A. B. Hammond shall prosecute such Writ of Error to effect, and answer all damages and costs, if he shall fail to make good said plea, then this obligation shall be void; [751] otherwise to remain in full force and virtue.

A. B. HAMMOND.

WILLIAM H. HAMMOND.

MARY P. FENWICK.

Approved this 25th day of September, 1914.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Sep. 25, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [752]

**[Certificate of Clerk U. S. District Court to Tran-
script of Record.]**

*In the District Court of the United States, in and for
the Northern District of California.*

No. 15,130.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. B. HAMMOND,

Defendant.

I, Walter B. Maling, Clerk of the District Court of the United States of America in and for the Northern District of California, do hereby certify the foregoing seven hundred and fifty-two (752) pages, numbered from 1 to 752, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the Clerk of said Court, and that the same constitute the return to the annexed Writ of Error.

I further certify that the cost of the foregoing return to Writ of Error is \$469.20; that said amount was paid by the defendant, and that the original Writ of Error and Citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 23d day of October, A. D. 1914.

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk. [753]

[Writ of Error (Original).]

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable, the Judges of the District Court of the United States for the Ninth Circuit, Northern District of California, Greeting:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between A. B. HAMMOND, plaintiff in error, and the UNITED STATES OF AMERICA, defendant in error, a manifest error hath happened to the great damage of the said A. B. HAMMOND, plaintiff in error, as by his complaint appears.

WE, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City

of San Francisco, in the State of California, on the 24th day of October, 1914, next in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of the United States District Court, for the Northern District of California, the 25th day of September [754] in the year of our Lord one thousand nine hundred and fourteen.

[Seal] WALTER B. MALING,
Clerk of the District Court of the United States, for
the Ninth Circuit, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by
WM. C. VAN FLEET,
Judge.

Service of the within citation and receipt of a copy thereof is hereby admitted this 25th day of September, 1914.

FRANK HALL,
JNO. W. PRESTON,
Attorneys for Plaintiff. [755]

[Endorsed]: No. 15,130. United States District Court, Northern District of California. United States of America vs. A. B. Hammond. Writ of

Error. Filed September 25, 1914. Walter B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Answer to Writ of Error.]

The answer of the Judges of the District Court
of the United States, in and for the Northern Dis-
trict of California.

The record and all proceedings of the plaint
whereof mention is within made, with all things
touching the same, we certify under the seal of our
said court, to the United States Circuit Court of Ap-
peals for the Ninth Circuit, within mentioned at the
day and place within contained, in a certain schedule
to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [756]

[Citation on Writ of Error (Original).]

UNITED STATES OF AMERICA—ss.

The President of the United States to the United
States of America, Greeting:

YOUR ARE HEREBY cited and admonished to be
and appear at a United States Circuit Court of Ap-
peals, for the Ninth Circuit, to be holden at the City
of San Francisco, in the State of California, within
thirty (30) days from the date hereof, pursuant to
a writ of error filed in the clerk's office of the District
Court of the United States, for the Northern Dis-
trict of California, wherein A. B. HAMMOND is

plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge, for the Northern District of California, this 25th day of September, 1914.

WM. C. VAN FLEET,
United States District Judge.

SERVICE of the within citation and receipt of a copy thereof is hereby admitted this 25th day of September, 1914.

FRANK HALL,
JNO. W. PRESTON,
Attorneys for Plaintiff. [757]

[Endorsed]: No. 15,130. United States District Court, Northern District of California. United States of America vs. A. B. Hammond. Citation. Filed September 25, 1914. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2503. United States Circuit Court of Appeals for the Ninth Circuit. A. B. Hammond, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Received and filed October 23, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.